70220-3

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No. 70220-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION I

KEBEDE ADMASU, *et al.*,

Appellants,

v.

THE PORT OF SEATTLE, a Washington municipal corporation,

Respondent.

# THE PORT OF SEATTLE'S BRIEF OF RESPONDENT

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## I. INTRODUCTION & SUMMARY OF ARGUMENT

Three property owners sued the Port of Seattle in June 2009 in a putative class action asserting one cause of action – inverse condemnation. They claimed a permanent decrease in their real property's value was caused by an alleged *increase* in noise, vibrations, and emissions from operations on the new Third Runway at the Port's Seattle-Tacoma International Airport ("Sea-Tac") after it went into use in late 2008.

Plaintiffs pursued these claims despite undisputed evidence (and an admission by their expert) that improved jet engine technology and lower numbers of flights resulted in properties around Sea-Tac experiencing a significant *decrease* in noise in the years preceding their lawsuit. *See* App'x 1. Plaintiffs presented no "before vs. after" evidence showing that noise actually increased across the proposed class areas after the Third Runway opened; the evidence in the record shows it did not. App'x 2.

Plaintiffs appeal the trial court's order denying class certification, a summary judgment order enforcing express avigation easements owned by the Port, and a summary judgment order dismissing claims as to which plaintiffs provided no evidence. This Court should affirm those orders.

Plaintiffs accuse the trial court of "disregarding time-honored judicial mechanisms" in managing this case. Appellants' Br. 1. To the contrary, the trial court allowed plaintiffs to file multiple motions for class

certification, but ultimately denied certification because they never carried their burden of showing that the case met the requirements of CR 23.

The trial court then entered a comprehensive case management order that had been negotiated and agreed to by the parties. That order (1) granted leave to file an amended consolidated complaint for 291 individual plaintiffs, (2) set pretrial deadlines and a trial date, and (3) adopted procedures for specified summary judgment motions that were to "be filed in a manner that will resolve as many claims in as efficient a manner as possible." CP 2084. The court granted those motions, which were based on defenses the Port had asserted throughout the case.

After the summary judgment decisions, 25 plaintiffs were left in the case. Rather than provide long-awaited discovery responses about their expert witnesses, the remaining plaintiffs voluntarily dismissed their claims. This appeal followed. This Court should affirm the rulings below.

No Abuse Of Discretion In Denying Class Certification. Plaintiffs brought three motions for class certification. At the hearing on the second motion, plaintiffs' counsel conceded that they had not met their burden of demonstrating that the case satisfied CR 23. RP 49; CP 897. The court specified deficiencies to be cured if they filed a third motion. CP 897-98.

Plaintiffs filed a third motion. Discovery and briefing were conducted over the next year. After considering an extensive record,

briefing, and hearings held over two days, the trial court again denied class certification. The trial court ruled that (1) the named plaintiffs did not adequately represent the class, (2) plaintiffs had not prepared a statistical model that could address their proof requirements on a class-wide basis, (3) individualized issues of fact necessary to resolve liability, damages, and the Port's defenses on a property-by-property basis predominated over common issues, and (4) a class action was not a superior method of resolving the inverse condemnation claims. In a 15-page order, the court carefully considered the record and each requirement of CR 23. CP 2055-69. The court did not abuse its discretion in denying class certification.

Avigation Easements Barred Claims. The Port's first summary judgment motion was based on express avigation easements granted to the Port as part of its noise mitigation program. Participants in that voluntary program received either cash payments or the installation of improvements such as upgraded windows, doors, and insulation provided by the Port at no cost to the property owners. The state statute authorizing the Port to conduct the program required property owners to convey an avigation easement to the Port in return for those benefits. The undisputed evidence – including expert testimony accepted by plaintiffs' counsel – showed, and plaintiffs concede on appeal, that Sea-Tac is operating within the noise levels allowed by the easements. Appellants' Br. 42.

The trial court *rejected* plaintiffs' arguments that the easements were obtained through duress, a procedurally unconscionable process or that their terms are substantively unconscionable. CP 3942-46. Plaintiffs do not challenge those rulings on appeal.

Plaintiffs' sole argument on appeal is that the easements are improper waivers of the right under the state constitution to receive compensation for a "taking or damaging" of a property interest. Plaintiffs cite no authority that a constitutional waiver analysis applies here. Through the easements, the Port acquired, and provided consideration for, the right to operate aircraft over and in the vicinity of plaintiffs' properties. The Port has not exceeded the scope of that right. The avigation easement order should be affirmed.

Trial Court Properly Dismissed Claims By Plaintiffs That Bought Property After The Port Published FAA-Accepted Noise Exposure Maps. The Port's second motion for summary judgment was based on a federal statute and regulations adopted by the FAA. Undisputed facts showed (1) the Port complied with FAA regulations when it published notice of two FAA-accepted Noise Exposure Maps ("NEMs"), (2) plaintiffs affected by the motion purchased their properties *after* notice of the NEMs was published, and (3) none of those plaintiffs could meet the requirement imposed on them by federal law of showing that current noise levels from

airport operations exceeded the levels shown on the applicable NEM. The Port's moving papers plainly requested dismissal of *all* claims asserted by those plaintiffs.

Plaintiffs conceded that their claims for damages based on noise from airport operations should be dismissed. RP 254. They argued against their complete dismissal from the case, however, by asserting that they had *alleged* claims based on factors other than airport noise, *i.e.* vibrations and emissions. Despite being on notice of the NEM defense for years, knowing for months that the NEM motion would be filed, and having an extended time to respond to the NEM motion, plaintiffs failed to submit any expert testimony on vibrations or emissions, and not one of the plaintiffs submitted a declaration or other evidence to show they had any claims other than those based on noise from airport operations. The trial court ruled that the plaintiffs could not rely solely on the *allegations* in the complaint to oppose summary judgment. Because they provided no evidence creating a material issue of fact to show non-noise claims existed, the court's order fully dismissing them was proper. RP 258.

## II. RESTATEMENT OF ISSUES ON APPEAL

The Port restates the issues on appeal as follows:

(1) In reviewing a class certification decision, appellate courts do not substitute their judgment for that of the trial court and will affirm if

the record indicates the trial court properly considered all CR 23 criteria. *Schnall v. AT & T Wireless Servs.*, 171 Wn.2d 260, 266, 259 P.3d 129 (2011). After three motions for class certification and multiple hearings, the trial court ruled that plaintiffs had not met their burden of establishing all elements of CR 23. Should this Court affirm the order denying class certification where the trial court carefully considered all CR 23 criteria?

(2) An avigation easement bars inverse condemnation, nuisance, and trespass claims if the easement holder is acting within the scope of the easement. *Petersen v. Port of Seattle*, 94 Wn.2d 479, 485, 618 P.2d 67 (1980). Uncontested evidence showed operations at Sea-Tac are within the scope of the avigation easements. Did the trial court correctly grant the Port's avigation easement summary judgment motion?

(3) A party opposing summary judgment may not rely on the allegations in the complaint, but must come forward with specific facts demonstrating a genuine issue of material fact. *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 561-62, 242 P.3d 936 (2010). After the Port moved to dismiss all of their claims and demonstrated that their noise claims must be dismissed, the plaintiffs presented no competent evidence showing that they had claims other than those based on noise from airport operations. Did the trial court properly grant summary judgment dismissing those plaintiffs from the lawsuit?

## III. STATEMENT OF THE CASE

This section provides facts setting the context in which this lawsuit was filed and its procedural history. Facts relating to class certification (Section IV), the avigation easements (Section V), and the noise exposure map defense (Section VI) are discussed in the pertinent sections.

### A. Federal Law Imposes A Specific Method For Measuring Noise From Airport Operations And For Assessing Whether Surrounding Property Uses Are Compatible With Airports.

Early models of jet airplane engines created significant amounts of noise. CP 386-87. In the 1970s, airports across the nation experienced a dramatic increase in jet traffic and an accompanying increase in noise from airport operations. CP 516, 2129, 2163-64. Congress passed the Aviation Safety and Noise Abatement Act of 1979 ("ASNAA") to address these issues. Pub. L. No. 96-193, 94 Stat. 50 (1980) (current version in relevant part at 49 U.S.C. §§ 47501-47510); *see* CP 517. FAA regulations implement this statute. 14 C.F.R. Part 150 ("Part 150").

As directed by Congress, Part 150 establishes a uniform way by which airport operators (like the Port) must measure aircraft noise levels. The FAA established the Integrated Noise Model ("INM"), a computer program that uses inputs such as the types of aircraft using an airport, the noise generated by the engines on those aircraft, the number of flights, the direction of the flights, wind direction, and the topography around the

airport to generate noise exposure maps. CP 3868-69. The INM measures noise exposure using a metric called the Day Night Average Sound Exposure Level ("DNL"). CP 385-86, 3868-69. NEMs look much like topographic maps, but the contours are based on DNL. *See, e.g.*, CP 410.

The Part 150 regulations also provide a process for identifying the various uses of property surrounding an airport and assessing whether they are compatible with the levels of noise from airport operations. CP 385-86, 388. An airport operator may prepare and submit to the FAA a noise exposure map and a noise compatibility program with proposed measures for mitigating the effects of noise on surrounding properties. CP 517-18, 3868. If the FAA accepts the submission, the airport operator may apply for federal funding of noise mitigation measures. CP 517-18.

The FAA has determined that aircraft noise below 65 dB DNL is compatible with residential use. CP 3869. As a result, Part 150 programs will only fund mitigation measures at residential properties that are in areas experiencing aircraft noise at or above 65 dB DNL. CP 518, 3869.

### B. Sea-Tac Airport's Voluntary Noise Remedy Program Has Provided More Than 9,500 Homeowners With Significant, No-Cost Property Improvements.

The Port was one of the early adopters of the Part 150 noise study process. The Port made its first Part 150 submission to the FAA in 1985, which the FAA approved. CP 517. Using federal funds, the Port started

its homeowner insulation program. *Id.* Both the noise study and the noise compatibility program have been periodically updated. CP 517-21, 3891.

A central feature of the Port's noise remedy program has been the homeowner noise insulation program. The Port started its homeowner insulation program in the mid-1980s. CP 517, 2129-31. Participation is entirely voluntary. *E.g.*, CP 2140. The program has provided noise mitigation to more than 9,500 homes around Sea-Tac at a total cost of approximately $220 million. CP 2129, 3891.

The Port needed legislative authorization to conduct the noise remedy program. The state legislature authorized such programs in 1974. Laws of 1974, 1st Ex. Sess., ch. 121 (Ch. 53.54 RCW) (CP 2686-88). To avoid a violation of Washington Constitution, article VIII, §§ 5 and 7, which prohibit local governments from making gifts of public funds, the law requires participants in the noise remedy program to convey an "avigation easement" to the Port in return for the noise insulation benefits received by the property owner. RCW 53.54.030(3); CP 2132-34.

### C. The Port Implemented Additional Noise Mitigation Measures In Planning For The Third Runway.

Around 1988, the Port, the FAA, and regional planners predicted that Sea-Tac could reach its maximum efficient capacity as early as 2000, and recognized the need for a new runway. CP 517-18. In the mid-1990s, in planning for the Third Runway, the Port prepared a multi-volume

environmental impact statement that comprehensively examined potential impacts of runway construction and operation, including noise and emissions. *Id.* The Port spent nearly 20 years planning, obtaining authorization for, and constructing the Third Runway. *Id.*

The planning for the Third Runway included updating the Port's noise exposure maps. In 2000, the Port embarked on another Part 150 Study update. CP 518. In 2002, the FAA accepted the Port's Part 150 Study and noise mitigation plan that incorporated noise exposure maps showing *existing* noise levels as of 1998 and *projected* noise levels for 2010 assuming the opening of the Third Runway. *Id.* When it approved construction of the Third Runway, the FAA required the Port to expand its noise remedy program to mitigate for the anticipated impacts of the Third Runway *before* it was constructed. CP 518-19.[1] As a result, the Port spent nearly $33 million in acquiring noise-impacted properties and

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[1] Before the Third Runway opened, aircraft could not land simultaneously in reduced visibility conditions because the original and second runways are too close together. CP 519. The Third Runway is located about 1,688 feet to the west of the second (center) runway, which allows for simultaneous arrivals on multiple runways in inclement weather, avoiding air traffic delays. *Id.* To formalize the use pattern for the Third Runway, the Port executed a Letter of Agreement ("LOA") with the FAA to establish a *Noise Abatement Informal Runway Use Program for Sea-Tac Airport.* The LOA clearly identifies how the FAA assigns runways to arriving and departing aircraft in various weather conditions. CP 519-20. The LOA is consistent with the preference of the FAA, the airlines, and the Port to use the runways closer to the terminal as much as possible to reduce aircraft taxi time. CP 520, 524-25. The LOA also demonstrates that the Third Runway is being used as predicted. CP 389-91, 403-04, 1295.

installing noise insulation at additional properties. CP 519.

### D. Airport Noise Around Sea-Tac Has Decreased Due To Improved Technology And Reduced Numbers Of Flights.

The area experiencing airplane noise at levels incompatible with residential use has decreased dramatically since the late 1990s. CP 384. In 1998, more than 15 square miles around Sea-Tac were exposed to noise at or above 65 dB DNL. CP 393. By 2010, only 5.4 square miles were exposed to that noise level, a reduction of 63 percent. *Id.* Much of that area is owned by the Port. CP 410, 496. The decreased area experiencing airport noise above 65 dB DNL is depicted in Appendix 1.

The decrease in airport noise around Sea-Tac results from two main factors. First, jet engine technology has improved dramatically. CP 2162-63. Sea-Tac eliminated older, noisier "Stage 2" aircraft from its fleet of planes by the mid-1990s. CP 517. Upgraded and newly manufactured "Stage 3" aircraft are much quieter than prior generations. CP 384, 386.

Second, total aircraft operations at Sea-Tac went down in the decade prior to the Third Runway opening. The September 2001 terrorist attacks, changes in the airline industry, and negative economic conditions led to decreasing operations. CP 386-87. Operations at Sea-Tac peaked in 2000 at 445,677 operations per year. CP 520. By 2008, the year in which the Third Runway opened, operations had fallen to 345,241. *Id.* In 2009,

the year after the Third Runway opened, total operations at Sea-Tac declined again to 317,873, down by approximately 28.7 percent from peak levels. *Id.* Although plaintiffs claim a "taking" occurred when the Third Runway opened in late 2008, operations actually decreased from 2008 to 2009. CP 387, 520.

### E. Studies Using The FAA's Integrated Noise Model Show Noise Decreased Or Stayed Flat After The Third Runway Opened.

The Port engaged Mr. Steve Alverson, an expert knowledgeable in the use of the INM to measure noise levels around airports. CP 382-84, 424. Plaintiffs engaged Dr. Sanford Fidell to opine on noise issues. CP 745-75. Mr. Alverson and Dr. Fidell agreed that contours generated by the INM could be used to compare noise levels from airport operations at different points in time. CP 1646, 1796-97. These comparisons are known as "difference contours." CP 382-84.

The Port's expert prepared difference contours showing noise levels in the 12-month period *before* the Third Runway opened and noise levels for a 12-month period of normal operations *after* it opened. CP 1297-1303. Mr. Alverson's uncontested testimony (CP 1297) and the difference contours contained in Appendix 2 (CP 1315) demonstrate that, with very limited exceptions, noise at properties around Sea-Tac decreased or stayed the same after the Third Runway opened.

### F. Property Values Around Sea-Tac Decreased Due To Negative Economic Conditions When Plaintiffs Filed This Lawsuit.

The Port also engaged three property valuation and real estate economic experts: Mr. Bates McKee, Dr. James DeLisle, and Dr. Terry Grissom. The valuation experts comprehensively examined census and assessors' data and made site visits to plaintiffs' proposed class area. CP 1349, 1365-68, 1400-55, 1457-62, 1507-13, 1521-61. The experts found that the class area contained numerous types of commercial, industrial, and residential properties subject to multiple value influences. CP 1364-67, 1458-62, 1464-68, 1507-13. Even residential property could be further subdivided into raw land, modest homes, multi-million dollar estates, and multi-family dwellings located at varying distances from Sea-Tac and subject to a myriad of differing land use regulations. CP 1508-13. The valuation experts concluded that the properties and the value influences were unique and that there was no common methodology that could be applied to accurately determine the alleged effects of Third Runway airport operations on the properties. CP 1365-68, 1457-68, 1503-07.

The Port's valuation experts also determined that "parsing" the alleged impact of the Third Runway would be extremely difficult on a class-wide basis because (1) the properties were at different locations in relation to Sea-Tac, (2) for decades the properties were influenced by aircraft operations from Sea-Tac's original two runways, and (3) plaintiffs

were making a claim for property value loss at a time when the residential real estate market was experiencing its worst drop in value since the Great Depression for reasons wholly unrelated to aircraft noise. CP 1367-68, 1457-61, 1463, 1504-05, 1513, 1516-18.

Finally, the Port's valuation experts reviewed the declarations, depositions, and materials submitted by the plaintiffs' valuation experts, Dr. Ronald Throupe and Mr. Wayne Hunsperger. CP 1349, 1457, 1504. They concluded that the plaintiffs' experts had not produced any model or methodology to determine the before-and-after effect of the Third Runway on class area properties or to quantify any reduction in property values allegedly caused by the Third Runway. CP 1350, 1357-58, 1363-68, 1461-62, 1502-07.

### G. Procedural History Overview.

Plaintiffs filed suit in June 2009. CP 1-18. Appendix 3 provides a timeline of the key events in the case. They are summarized below.[2]

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[2] The original complaint alleged federal constitutional violations. CP 9. The Port removed the case to federal court. It was remanded after plaintiffs stated they meant to assert claims solely under state law. Remand Order pp. 3-4 (Sept. 22, 2009). Plaintiffs filed an amended complaint after remand. CP 19-29. It asserted state law claims for injunctive relief prohibiting nighttime operations at Sea-Tac and seeking to impose other restrictions on operations. CP 28. On the Port's motion, the trial court dismissed the claims for injunctive relief because they were preempted by the comprehensive federal regulatory structure for national air traffic. Order Dismissing Plaintiffs' Claim For Injunctive Relief As Preempted (May 31, 2010). Plaintiffs have not appealed that ruling. (The Remand Order and Dismissal Order are in the Port's Second Supplemental Designation of Clerk's Papers filed concurrently with this Brief.)

Class Certification Motions. Plaintiffs filed their first motion for class certification in May 2010. CP 37-62. They filed a second, amended certification motion in October 2010, noting it five court days later. CP 219-48. The trial court granted the Port's motion to strike the hearing date and set a discovery and briefing schedule. CP 314-18.

The trial court held a hearing on the amended motion on January 21, 2011. RP 1-56. Near the end of the hearing, plaintiffs' counsel conceded that they had not presented evidence sufficient to satisfy their burden of showing that the case met the requirements of CR 23. RP 49; CP 897. The trial court denied the amended motion. CP 897-98.

Plaintiffs filed their third motion for class certification in April 2011, this time supported by expert witness declarations as well as declarations of counsel and the proposed class representatives. CP 1000-1287. Both sides conducted discovery and submitted briefing, including briefing on the impact of 342 individual tort claim forms seeking damages *other* than those alleged in the complaint, which plaintiffs' counsel served on the Port in November 2011. CP 1272, 1969-76, 1977-2033, 2037-48. The trial court held hearings on the third motion for class certification on February 3 and February 6, 2012. RP 76-172. The trial court entered its order denying class certification on April 9, 2012. CP 2055-69.

Schedule Set For Consolidated Individual Claims. After the trial court ruled that the case would not proceed as a class action, plaintiffs filed an amended complaint asserting the consolidated claims of 291 individual plaintiffs. CP 2070-81. The parties agreed to and the trial court entered a comprehensive case management order in August 2012. CP 2082-87. Trial was set for October 2013. CP 2087.

The case management order set fact and expert witness discovery cutoffs and other pretrial deadlines. CP 2085-86. It also included procedures for summary judgment motions on the avigation easement and noise exposure map issues. The parties "agree[d] that such motions should be filed in a manner that will resolve as many claims in as efficient a manner as possible." CP 2084.

Summary Judgment Motions. As envisioned by the case schedule, the Port brought its first motion for summary judgment based on the avigation easements. CP 2097-2692. The court issued a memorandum opinion granting that motion on December 21, 2012 (CP 3933-47) and entered a formal order on February 19, 2013 (CP 4294-4300). The Port brought the second motion for summary judgment based on the noise exposure maps. CP 3844-3932. That motion was granted in an order dated April 3, 2013. CP 4548-54.

Plaintiffs' Voluntary Dismissal. Following the summary judgment rulings, 25 plaintiffs remained in the case. Plaintiffs' discovery responses regarding the opinions of their expert witnesses were due May 28, 2013. CP 4752. Instead of providing those responses, the remaining 25 plaintiffs filed a motion for voluntary dismissal. CP 5113-14.

Appellate Proceedings. Plaintiffs filed a Notice of Discretionary Review one week after the trial court entered its order granting the Port's NEM motion. CP 4605-06. That proceeding was rendered moot when the remaining plaintiffs voluntarily dismissed their claims and a final judgment was entered. CP 4839-48. Plaintiffs filed a broad Notice of Appeal. CP 4849-4914.

In their opening brief, plaintiffs challenge only certain aspects of the class certification order, the avigation easement order, and the noise exposure map order. Appellants' failure to assign error or provide any supporting argument and authority on issues other than those raised in their opening brief constitutes a waiver on appeal. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986); RAP 10.3(a)(4), (6). The Court will not consider arguments on such issues if raised for the first time in the reply brief. *Bercier v. Kiga*, 127 Wn. App. 809, 826 n.17, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005).

## IV. ARGUMENT: THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY DENYING CLASS CERTIFICATION

### A. Class Certification Orders Are Affirmed Unless They Constitute An Abuse Of Discretion.

The Washington Supreme Court recently noted that the standard of review is "paramount" in cases reviewing decisions on class certification. *Schnall*, 171 Wn.2d at 266. When reviewing "a trial court's decision to deny class certification, that decision is afforded a substantial amount of deference," and if the record indicates the court properly considered all CR 23 criteria, the appellate court must affirm. *Id.* A trial court's decision on class certification will be affirmed absent a manifest abuse of discretion. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995); *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 280-81, 267 P.3d 998 (2011) (no abuse of discretion where court considered extensive briefing and four days of oral argument).

### B. Plaintiffs Have The Burden Showing That The Case Meets All Of The Requirements Of CR 23.

Class actions are an exception to the usual rule that litigation is conducted by the individual named parties. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013). Strict conformity with each element of CR 23 is required. *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974).

Plaintiffs have the burden of proving the case meets all of CR 23's requirements. *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007). "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2251, 180 L. Ed. 2d 374 (2011). A party seeking class certification must affirmatively show compliance with CR 23 and "prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original); *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 18-19, 65 P.3d 1 (2003). Actual, not presumed, conformance is indispensable because absent class members are bound by the result. *See Oda v. State*, 111 Wn. App. 79, 92, 44 P.3d 8, *review denied*, 147 Wn.2d 1018 (2002).

Before granting class certification, the trial court must conduct a "rigorous analysis" to ensure that all prerequisites of CR 23 are met. *Schwendeman*, 116 Wn. App. at 18-19. The court may probe behind the pleadings and will consider the evidence in the record, including expert testimony, to determine whether the plaintiffs have satisfied their burden. *Id.* at 21 n.34; *Oda*, 111 Wn. App. at 94; *accord Dukes*, 131 S. Ct. at 2251. Statistical or damages models must be presented and tested, must match the asserted theory of liability, and must produce results on a class-wide basis. *Comcast Corp.*, 133 S. Ct. at 1433-35; *see also Dukes*, 131 S. Ct. at 2551-52; *Oda*, 111 Wn. App. at 94.

After affording plaintiffs repeated chances to meet their burden under CR 23 and after conducting a rigorous analysis, the trial court denied certification because plaintiffs failed to establish the requirements of adequacy, predominance, and superiority. CP 2055-69.[3]

### C. The Trial Court Did Not Abuse Its Discretion In Finding That The Predominance Requirement Was Not Satisfied.

To meet the predominance requirement, plaintiffs must prove that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." CR 23(b)(3). This standard is "more exacting and stringent than the commonality requirement" of CR 23(a). *Schwendeman*, 116 Wn. App. at 20; *accord Schnall*, 171 Wn.2d at 269-70. The trial court did not abuse its discretion in finding that individual issues predominated in this case.

#### 1. Inverse Condemnation Cases Inherently Involve Predominantly Individual, Property-Specific Issues.

The only claim asserted in the case at the time plaintiffs sought to certify a class was inverse condemnation. To establish a taking of property through the effects of airplane noise and related impacts, a plaintiff must prove a permanent, measurable diminution in the market

[3] The Port argued below and maintains that plaintiffs' class definition is fundamentally flawed (which the trial court did not directly address) and that plaintiffs failed to satisfy numerosity, commonality, and typicality based on the evidence and arguments presented. *See* CP 1772-1831 (and the evidence cited therein). This Court may affirm on any grounds adequately supported by the record. *Fulton v. Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 147, 279 P.3d 500 (2012).

value of the plaintiff's property that is caused by the aircraft operations. *Martin v. Port of Seattle*, 64 Wn.2d 309, 318-20, 391 P.2d 540 (1964). Diminution in value is not simply the measure of damages in an inverse condemnation case; it is the benchmark for whether a taking has occurred at all. *Id.* A plaintiff must prove the amount of damages in an inverse condemnation action. *Keene Valley Ventures v. City of Richland*, 174 Wn. App. 219, 226, 298 P.3d 121, *review denied*, 178 Wn.2d 1020 (2013).

It is a "fundamental maxim that each parcel of land is unique." *City of San Jose v. Superior Court*, 525 P.2d 701, 711, 115 Cal. Rptr. 797 (Cal. 1974) (affirming denial of class certification in airport noise case). Valuation of real property is affected by many factors, including location, zoning, and quality of improvements. CP 1507-08, 1535-40. Assessing how much noise from Third Runway operations reaches a particular parcel requires consideration of its relation to the flight tracks, altitude, direction, and types of planes taking off and landing, other sources of noise, topography, and the type of construction on the property. CP 384.

Courts consistently deny class certification in airport noise inverse condemnation cases because they require so much individualized,

property-specific proof.[4] *Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989) ("No wonder courts routinely decline to certify classes in airport-noise cases."). In the early 1990s, the Honorable Thomas S. Zilly denied certification for this very reason in a case involving the second runway at Sea-Tac, despite a smaller, allegedly "homogenous" class area of 134 residential properties:

> [N]o matter how "homogenous" the putative class is, the individualized proof requirements in an inverse condemnation case and the uniqueness of real property in general make class action treatment inappropriate.

App'x 4 (CP 549, 556-72).

**2. Express Avigation Easements And Applicable FAA Regulations Imposed Additional Property-Specific Proof Requirements On Many Of The Class Members.**

The Port consistently argued that two of the named plaintiffs' claims and the claims of thousands of putative class members were barred by express avigation easements and applicable federal law. CP 182-89, 341-44, 1800-01, 1822-23. Both of these presented individualized

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[4] *See, e.g.*, *Testwuide v. United States*, 56 Fed. Cl. 755, 761, 765-66 (2003) (rejecting proposed sub-classification of properties based on noise contours and explaining that "[t]he results may differ based on the specific factual circumstances and variables affecting each group that go to the root of the question of whether a taking occurred"); *Virginians for Dulles v. Volpe*, 344 F. Supp. 573, 575 (E.D. Va. 1972), *aff'd in relevant part*, 541 F.2d 442 (4th Cir. 1976); *Town of East Haven v. Eastern Airlines, Inc.*, 331 F. Supp. 16, 18 (D. Conn. 1971), *aff'd*, 470 F.2d 148 (2d Cir. 1972); *Ursin v. New Orleans Aviation Bd.*, 515 So.2d 1087, 1089 (La. 1987); *Ario v. Metro. Airports Comm'n*, 367 N.W.2d 509, 514-16 (Minn. 1985); *City of San Jose*, 525 P.2d at 710-12; *Alevizos v. Metro. Airports Comm'n*, 216 N.W.2d 651, 668 (Minn. 1974) (inverse condemnation claim from airport operations is "incompatible with a class action since there are a multitude of individual issues and an absence of common issues").

questions on which property owners bore the burden of proof. The Avigation easements require property-specific proof of the scope of the particular property's easement, the property's baseline noise level, and the property's current noise level. CP 2133, 2173; *see, e.g.*, 2182-83. Similarly, FAA regulations impose a burden on the claimant to show that the current noise level at the plaintiffs' specific property exceeds the value established by the applicable NEM. 14 C.F.R. § 150.21(f), (g). Federal law imposes this burden on the claimant "in addition to" all other elements that have to be proven to recover. *Id.*; 49 U.S.C. § 47506.

Issues raised by the defendant must be considered in analyzing whether individual issues will predominate in the resolution of a putative class action. *Schnall*, 171 Wn.2d at 273; *duPont v. Perot*, 59 F.R.D. 404, 413 (S.D.N.Y. 1973). The existence of overwhelmingly individual issues was borne out by the summary judgment proceedings in this case. When the Port moved for summary judgment on its avigation easement and NEM defenses, the Port submitted undisputed property-by-property evidence showing there was no issue of fact and that plaintiffs could not carry their various burdens. CP 2155-2692, 3863-3932.

### 3. Plaintiffs' Expert Testimony About Annoyance Did Not Establish A Predominance Of Common Issues.

In appealing the predominance finding, plaintiffs focus on the trial court's determination that they failed to present a methodology for proving

a class-wide diminution of property values caused by noise, vibrations, or emissions attributable to the Third Runway.[5] Appellants' Br. 25. Plaintiffs assert that Dr. Sanford Fidell's work established the "causative chain" between the Third Runway's operations and diminution in property values. *Id.* at 26. This argument is contradicted by the record.

**a. Dr. Fidell Did Not Analyze Noise.**

Although he was disclosed as plaintiffs' "noise" expert, Dr. Fidell testified to having "*no empirical information about noise levels*" and that his opinion on whether noise had increased in the class area "*would be speculation.*" CP 1667, 1635. The empirical data was available. Dr. Fidell testified that he could have compared pre- and post-Third Runway noise data using noise contours to see if aircraft noise levels had increased. CP 1646. He acknowledged that such difference contours are an appropriate method to compare pre- and post-Third Runway noise levels. *Id.* Dr. Fidell gave a simple explanation for why he did not do this: "*Nobody asked me to.*" *Id.*

The Port's noise expert, Mr. Alverson, prepared difference contours showing that the class area experienced a decrease in noise after

[5] Appellants do not take issue with the trial court requiring such a model, but rather with the court's finding that they did not provide one. Indeed, the court's direction to plaintiffs is consistent with the rigorous analysis required by CR 23. *See Oda*, 111 Wn. App. at 94 (rigorous analysis requires "discussion of the theory of the plaintiffs' case as well as consideration of the statistical model with which they intend to prove it"); *accord Comcast Corp.*, 133 S. Ct. at 1433-35.

the Third Runway opened. CP 1293-1347. He also prepared noise contours that segregated the operations on the Third Runway and those that occurred on Sea-Tac's two other runways, which he called the "Old Runways." CP 1295-96, 1313, 1335-41. This analysis showed that the major noise sources are take-offs and landings on Sea-Tac's two *original* runways. CP 1295-1303.[6]

Not only did Mr. Alverson's analysis show that noise went down in virtually the entire proposed class area after the Third Runway opened, it also demonstrated that the Third Runway's contribution to aircraft noise exposure at a particular property in the class area varies considerably depending on location. CP 1295-1303, 1315, 1317. Thus, the record showed no "common" Third Runway noise effect on properties within the class area. CP 1297-98, 1309-10, 1315, 1317.

**b. Dr. Fidell Did Not Demonstrate Causation.**

Instead of creating sub-classes based on noise impact (as counsel had promised the trial court (RP 53-55)), Dr. Fidell instead used his one-of-a-kind "Community Tolerance Level" ("CTL") analysis. CTL is a snapshot of the DNL level at which one-half of the individuals who responded to Dr. Fidell's social survey characterized themselves as

[6] Mr. Alverson's analysis of airport operations records demonstrated that 98.9 percent of all departures use the Old Runways and only 1.1 percent of departures leave from the Third Runway. CP 1295.

"highly annoyed." CP 1038-1213, 1304-10, 1349-68, 1400-55. According to Dr. Fidell, this "annoyance" is caused by a combination of acoustic (sound energy) and non-acoustic factors (*e.g.*, distrust of government, feelings about the airport's operator, fear of aircraft crashes, etc.). CP 1638. Dr. Fidell conceded that CTL is not a substitute for measuring noise; rather, it is his way of measuring how aircraft noise and non-acoustic factors are viewed by a community (as defined by his survey pool) at a particular point in time. CP 1640. Significantly, Dr. Fidell agreed that aircraft noise levels around Sea-Tac went down around 2000 and 2001. CP 1632.

Dr. Fidell also conceded that the increased degree of annoyance at a lower DNL level that was reported in his 2009 study was exclusively *due to non-acoustic factors*, not aircraft noise. CP 1308, 1653-59. Dr. Fidell's survey also failed to segregate the impact of the Third Runway from total airport operations. CP 1357-58. His survey only asked respondents about their annoyance with "aircraft noise" and did not ask questions about the Third Runway at all. CP 1358.

Causation is critical to proving liability for inverse condemnation. "To have a taking, some governmental activity must have been the direct or proximate cause of the landowner's loss." *Phillips v. King County*, 136 Wn.2d 946, 966, 968 P.2d 871 (1998); *accord Highline Sch. Dist. No. 401*

*v. Port of Seattle*, 87 Wn.2d 6, 13, 548 P.2d 1085 (1976) (provable decline in value must be caused by noise interference). Governmental conduct that does not, in fact, cause damage to a particular plaintiff's property cannot constitute a taking. *Gaines v. Pierce County*, 66 Wn. App. 715, 726, 834 P.2d 631 (1992), *review denied*, 120 Wn.2d 1021 (1993).

At most, Dr. Fidell's testimony shows an increase in annoyance for particular individuals caused by non-acoustical factors. He did not study noise at all, much less show that an increase in *noise* attributable to the Third Runway *caused* a diminution in property values. Annoyance is not the type of injury that supports an inverse condemnation claim. *Pierce v. Ne. Lake Wash. Sewer & Water Dist.*, 123 Wn.2d 550, 563-64, 870 P.2d 305 (1994) ("Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated."); *see Bodin v. City of Stanwood*, 79 Wn. App. 313, 322, 901 P.2d 1065 (1995).

**4. Plaintiffs' Valuation Experts Did Not Provide A Class-Wide Model For Causation And Damages.**

The trial court specifically ordered plaintiffs to provide a model showing how they would establish that allegedly increased noise from operations on the Third Runway caused a decrease in value for each property in the class. CP 897-98; RP 54-55. Despite having more than a

year after receiving the trial court's direction and the second hearing, plaintiffs did not satisfy their burden to provide a causation methodology.

### a. There Was No Connection Between Dr. Fidell's Studies And The Theories Advanced By Plaintiffs' Valuation Experts.

As the trial court found, "[n]one of the studies relied upon by Plaintiffs' valuation experts used Dr. Fidell's CTL index or an analysis of noise complaints to assess the effect of airport noise on property values." CP 2061. Indeed, Dr. Fidell admitted that his CTL model had not been used in any context to quantify aircraft noise impacts on property values, *or in any condemnation proceeding*. CP 1631, 1644, 1663.

Plaintiffs' valuation experts did not understand what CTL measured or how it could affect their valuation analysis. CP 1713-14. Neither of them had ever conducted an appraisal where "annoyance" was included as a property attribute. CP 1714, 1687. CTL values are not publicly available and measure attitudes of current owners, not prospective buyers, so they do not influence market values. CP 1366-67, 1462-63.

Finally, plaintiffs' valuation experts made clear at their depositions that an assessment of noise levels *before* and *after* the Third Runway opened was critical to assessing whether allegedly increased noise had negatively affected the values of any properties in the class area. They erroneously believed, however, that Dr. Fidell would be providing them

with this critical information. CP 1713, 1679. Dr. Fidell did not conduct any before-and-after analysis of aircraft noise levels in the putative class area. CP 1667. Plaintiffs' valuation experts also did not study or know if noise went up in the class area after the Third Runway opened. CP 1679.

**b. Plaintiffs' Valuation Experts' Assurances That They *Could* Build A Model Are Not Sufficient To Support Class Certification.**

At their depositions, plaintiffs' valuation experts admitted that they had not devised a valuation model that could prove, on a class-wide basis, whether allegedly increased Third Runway-related aircraft noise affected property values. *E.g.*, CP 1691, 1713, 1679-80, 1687. Rather, they offered only unsubstantiated assurances that they *could* devise such a model. Mr. Hunsperger testified that *"[w]e haven't put the model together, but we've done it in other situations and know that it can be done."* CP 1680. Likewise, Dr. Throupe testified that he had done no hedonic analysis, paired sales comparisons, appraisals, surveys, or formal inspections. CP 1704-05.

Dr. Throupe did not know how the plaintiffs were going to address the wide variation in aircraft noise levels experienced in the class area:

> *[I] don't know if we're using noise contours or we're using a combination of noise and incident [sic] that Dr. Fidell has proposed. So until he tells us ... which way he's going to go and we determine the final boundaries, I'd just be speculating on that.*

CP 1697. When asked which areas would be isolated based on aircraft noise levels, he said: "*Any area, whatever it happens to be.*" *Id.*

Instead of offering a specific methodology as the court directed, plaintiffs offered vague assurances that their experts *could* develop a model after a class was certified. CP 1457-58, 1504-06, 2067; *see also* CP 1676-88, 1690-1716. This is not enough. Class certification requires more than unsubstantiated assurances that the elements of a claim can be proven on a class-wide basis. *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68-72 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978). Without such a model, individualized issues and proof on issues such as causation and damages will predominate over any common issues. *Comcast Corp.*, 133 S. Ct. at 1433-35 (requiring a workable model establishing that damages are capable of measurement on a class-wide basis based on the asserted liability theory); *Oda*, 111 Wn. App. at 94.

**c. Plaintiffs' Valuation Experts Conceded The Case Required Thousands Of Individualized Analyses.**

Plaintiffs' proposed class area was geographically overbroad and contained different types of residential properties, including vacant land, condominiums, modest single-family homes, apartment buildings, and large mansions. CP 1531-32. The area was spread across several different municipalities and zoning designations, and some properties had unique characteristics such as residential properties in commercial zones or

located adjacent to industrial properties. CP 1508. Even among residential properties, there were different values, value influences, noise environments, proximity to Sea-Tac, and noise attributable to the Third Runway. CP 1510-13. Because of its diversity, the class area was not a viable geographic unit for valuation purposes. CP 1364-67, 1459-62, 1507-13.

Plaintiffs' experts admitted they would need to divide the class area further, but they could not state how many subdivisions would be needed, how they would be defined, or whether multiple, unique valuation analyses would be required. CP 1460, 1678-80, 1697-98, 1706, 1708, 1710, 1715. The best they could say was that they were going to "*carve up some areas.*" CP 1710. Plaintiffs' experts also anticipated using hundreds, if not thousands, of individual property appraisals, owner interviews, and property drive-bys to account for the myriad individual characteristics of the properties. CP 1691.[7]

**d. Plaintiffs' Valuation Experts Were Not Seeking To Provide Property-Specific Results.**

An inverse condemnation plaintiff seeks compensation for the alleged governmental taking of a specified property right. CP 1506; *see Phillips*, 136 Wn.2d at 957. Plaintiffs' valuation experts did not explain

[7] Plaintiffs had also proposed a Class Area B that was farther away from Sea-Tac, experienced markedly lower noise levels, and had no class representatives. Plaintiffs do not appeal the court's denial of class certification for that area. Appellants' Br. 10 n.35.

how they would identify or quantify the property right that the Port had allegedly taken. CP 1504. Instead, plaintiffs' experts testified that they planned to test for the generalized effect of the Third Runway by examining property values before and after it opened. CP 1505. They then proposed having class members somehow equitably allocate the aggregate class-wide diminution that they intended to calculate, perhaps through some sort of group participation. CP 1711-12.

Plaintiffs' experts' embryonic study concept was flawed because it failed to address the elements of a condemnation award, which, for each property, must specify the property right that the government has acquired and establish the fair market value of that right. CP 1518. Their proposed process was the opposite of what condemnation proceedings seek to determine – compensation for a specific interest in a particular property that is fair to the property owner, the government, and the public. CP 1518; *see Galvis v. Dep't of Transp.*, 140 Wn. App. 693, 703-04, 167 P.3d 584 (2007), *review denied*, 163 Wn.2d 1041 (2008). This method would not carry plaintiffs' burden of proving the damage to the specific plaintiff's property. *Keene Valley Ventures*, 174 Wn. App. at 226.

Given this record, it was not an abuse of discretion for the court to find individualized issues predominated over common issues and that plaintiffs had failed to present a class-wide damages and causation model.

### D. The Trial Court Did Not Abuse Its Discretion By Finding That A Class Action Is Not A Superior Method For Resolving Inverse Condemnation Claims.

CR 23(b)(3) also requires a class action to be superior to other available methods for the fair and efficient adjudication of the case. A class action *must be superior, not just as good as*, other available methods. *Schnall*, 171 Wn.2d at 275. "If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'" *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001). The trial court did not abuse its discretion in finding that a class action was not superior for litigating property-specific inverse condemnation claims.

#### 1. The Predominance Of Individualized Issues Makes A Class Action Not Superior To Other Proceedings.

Predominance and superiority are closely related: "When a court determines that common questions do not predominate over individual ones ... the court is highly likely to find that a class action is also not superior because of the management difficulties posed by the individual questions." 2 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 4:32, at 283 (4th ed. 2002); *accord Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs.*, 601 F.3d 1159, 1184 (11th Cir. 2010) (predominance analysis has "tremendous impact" on superiority analysis). Cases with predominantly individual questions

digress into a series of mini-trials, weighing down the court and the litigants. *See, e.g.*, *Danvers Motor Co. v. Ford Motor Co.*, 543 F.3d 141, 149 (3d Cir. 2008); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986) (individualized determinations impose "an excessive managerial burden" on the court).

This problem is especially prevalent in inverse condemnation cases relating to airport operations. *E.g.*, *Ario*, 367 N.W.2d at 514-16; *City of San Jose*, 525 P.2d at 710-12. Not only do such cases present a multitude of property-specific issues concerning liability, causation, and damages, but there is an inherent overlap between the liability and damages determination. *Martin*, 64 Wn.2d at 318-20; *Ario*, 367 N.W.2d at 515 ("Diminution in market value is so wedded to noise invasion that the former cannot be proved without again proving the latter.").

Appellants' assertion that their valuation experts' methodology would obviate the need for any individual appraisals or valuations is blatantly contradicted by the record. Appellants' Br. 27. Dr. Throupe testified that, for any valuation model actually created, "hundreds," if not "thousands," of individual property assessments would be needed to account for the endless number of variations in property type, location, age and other distinguishing features. CP 1691. This defeats the purpose. As the *City of San Jose* court observed:

> Given the many recognized factors combining to make up the uniqueness of each parcel of land, the number of subclassifications into which the class would be required to be divided to yield any meaningful result would be substantial. … The result becomes a statistical permutation, and the requisite number of subclassifications quickly approaches the total number of parcels in the class. Under such circumstances, there is little or no benefit in maintaining the action as a class.

525 P.2d at 711 (denying certification in an airport noise case).

The trial court did not abuse its discretion when in holding that a mini-trial for each property on liability and damages eliminated any benefit from a class action.

### 2. A Class Action Is Not Superior When Class Members Will Pursue Their Own Claims.

The superiority analysis also requires the court to assess whether absent class members show an interest in individually controlling the prosecution of their separate claims. CR 23(b)(3)(A). A class action is not "superior" if members of the putative class will pursue their own cases. *Zinser*, 253 F.3d at 1190.

While the third class certification motion was pending, two of the three proposed class representatives and 340 other potential class members filed administrative tort claims against the Port asserting claims in addition to the ones asserted in the putative class action. CP 1977-2033. After certification was denied, 291 plaintiffs joined in the consolidated complaint, again asserting claims that were omitted from the class

complaints. CP 2070-81. These claimants/plaintiffs plainly showed that they did not need a class action to assert their claims.

Plaintiffs' argument that a class action is necessary to provide claimants with access to the courts is simply wrong. Appellants' Br. 27-28. Litigation costs are not a barrier to bringing an inverse condemnation claim because attorneys' fees and expert witness fees are recoverable by successful inverse condemnation claimants. RCW 8.25.075(3). The individual plaintiffs were also being jointly represented on a contingent fee basis. *See, e.g.*, CP 1999-2013. There was simply no basis to conclude that property owners were unable or unlikely to pursue their claims – and in fact they did.

The trial court did not abuse its discretion in finding that a class action would not be a superior method of handling this litigation.

### E. The Trial Court Did Not Abuse Its Discretion In Finding That The Proposed Class Representatives Did Not Adequately Represent The Class.

CR 23(a)(4) requires that class representatives "fairly and adequately protect the interests of the class." Certification should be denied when a class representative's interests are antagonistic to those of absent class members. *DeFunis*, 84 Wn.2d at 622. The trial court correctly found that the class representatives did not adequately represent the class because of a conflict in their interests. CP 2065-66. That

conflict arose from the class representatives' tactical decision to engage in "claim-splitting" that is prohibited under Washington law.

An injured party is limited to one lawsuit for property and/or personal injury damage resulting from one set of facts. *Landry v. Luscher*, 95 Wn. App. 779, 782, 976 P.2d 1274, *review denied*, 139 Wn.2d 1006 (1999). "Claim-splitting" is the attempted filing of separate lawsuits based on the same events and is prohibited under Washington law. *Sprague v. Adams*, 139 Wash. 510, 520, 247 P. 960 (1926); *Landry*, 95 Wn. App. at 782-83. This rule applies to class actions. *Knuth v. Beneficial Wash., Inc.*, 107 Wn. App. 727, 31 P.3d 694 (2001). A judgment in a case asserting only part of a claim precludes a second action for the remainder. *Landry*, 95 Wn. App. at 782. This prohibition against claim-splitting is in accord with the policies of finality and avoiding duplicate litigation that underlie *res judicata* principles. *Id.* at 782-83.

The class representatives admitted that they limited the claims asserted in the putative class action to those for permanent decreases in real property value, purposefully foregoing claims for personal injuries. RP 27. Plaintiffs' counsel made this tactical decision specifically to increase their odds of obtaining class certification. RP 27-28. This attempted claim-splitting created a conflict with absent class members who, if the class was certified, would have been precluded from pursuing

personal injury claims. This was not a hypothetical conflict. Two class representatives and 340 absent class members filed individual tort claims with the Port asserting precisely the claims omitted from the class action, and 291 plaintiffs later sued to assert those claims. CP 2037-48.

### 1. Class Representatives Are Inadequate When They Abandon Claims To Achieve Class Certification.

Numerous courts, including the Western District of Washington, have held that claim-splitting to achieve class certification renders class representatives inadequate. *E.g.*, *Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 634 (W.D. Wash. 2011); *Kelecseny v. Chevron, U.S.A., Inc.*, 262 F.R.D. 660, 672-73 (S.D. Fla. 2009); *Krueger v. Wyeth, Inc.*, No. 03cv2496, 2008 WL 481956, at *2-4 (S.D. Cal. Feb. 19, 2008); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 606 (S.D.N.Y. 1982). This principle has been applied to deny class certification in the airport noise context where class representatives failed to bring reasonably expected personal injury claims in addition to their claims for property damages. *City of San Jose*, 525 P.2d at 808-09.

Plaintiffs assert for the first time on appeal that the prohibition on claim-splitting does not apply in class actions. Appellants' Br. 20. But the principle they cite actually arises with class actions certified for injunctive and declaratory relief under Rule 23(b)(1) or (2). *See Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir. 1996) (citing general rule that a

class action suit seeking only declaratory and injunctive relief will not bar subsequent individual damage claims by class members); *Cholakyan v. Mercedes-Benz, USA*, 281 F.R.D. 534, 562-65 (C.D. Cal. 2012) (mandatory, one-size-fits-all remedy that does not allow class members to opt out may diminish risk of claim preclusion for absent class members).

The rule that attempted claim-splitting creates a conflict of interest and makes class representatives inadequate is routinely enforced in damages cases (like this one) seeking certification under CR 23(b)(3).[8] In those cases, "concerns about preclusion are much more significant, [and] courts have refused to certify classes based on conflicts of interest between the named plaintiffs and the absent class members." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827, 2012 WL 273883, at *3 n.5 (N.D. Cal. Jan. 30, 2012) (distinguishing claim-splitting in 23(b)(3) cases). The trial court did not abuse its discretion in finding the class representatives inadequate because of this adversity with the class.

### 2. Plaintiffs' Claims For Inverse Condemnation Would Recover Only For Real Property Damages.

Appellants argue that they properly represented the absent class members because their claim for inverse condemnation would have

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[8] *E.g., Beal v. Lifetouch, Inc.*, No. CV 10-8454-JST, 2012 WL 3705171, at *4 (C.D. Cal. Aug. 27, 2012); *Sanchez v. Wal Mart Stores, Inc.*, No. 2:06-CV-02573, 2009 WL 1514435, at *3 (E.D. Cal. May 28, 2009); *W. States Wholesale, Inc. v. Synth. Indus.*, 206 F.R.D. 271, 277 (C.D. Cal. 2002); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 550 (D. Minn. 1999); *Pearl v. Allied Corp.*, 102 F.R.D. 921, 923-24 (E.D. Pa. 1984).

adequately compensated absent class members for personal injuries. Appellants' Br. 20-23. This is a complete misreading of the *Highline* decision, which holds that inverse condemnation is the sole permissible cause of action when a plaintiff seeks to recover only for a taking or damaging of real property by a municipality. *Highline*, 87 Wn.2d at 17 (school district sought recovery "only for loss of property rights, not personal or other injuries"). However, "where a plaintiff seeks to recover damages for *other than loss of property rights* … the nuisance remedy is still available." *Id.* at 17-18 (emphasis added).

An inverse condemnation claim, by its very nature, addresses only injury to property rights and could not compensate for personal injuries. *See id.* at 13 n.5; *Martin*, 64 Wn.2d at 319. Class representatives Miriam Bearse and Darlene Moore and other putative class members sought *other* damages under tort theories not asserted in the class action at the time plaintiffs sought certification. CP 1977-79. The inverse condemnation claim alone could not recover for these other alleged injuries.

Despite multiple opportunities, plaintiffs failed to satisfy their burden under CR 23. The trial court carefully considered each element of the rule and properly denied class certification. This Court should affirm.

## V. ARGUMENT: THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ENFORCING THE PORT'S EXPRESS AVIGATION EASEMENTS

The trial court dismissed on summary judgment the claims of 126 plaintiffs (the "Easement Plaintiffs") based on the Port's express avigation easements over their properties. Plaintiffs conveyed the easements to the Port in exchange for valuable sound insulation improvements or cash payments as part of the Port's voluntary and statutorily authorized noise remedy program.

The Easement Plaintiffs concede, and the undisputed evidence shows, that operations at Sea-Tac do not exceed the scope of the avigation easements. Appellants' Br. 42-43; CP 1260-72, 2173-2692. Instead, the Easement Plaintiffs argue on appeal that the easements should not be enforced because they were not a voluntary or knowing waiver of their constitutional rights to compensation for the taking of a property interest. Appellants' Br. 47-52. These arguments are variations of other contract formation defenses that the trial court rejected and as to which the Easement Plaintiffs have not appealed.[9] The Easement Plaintiffs cite no authority showing that a constitutional waiver analysis is appropriate here,

[9] Plaintiffs do not challenge the trial court's ruling that the easements were not obtained by coercion or misrepresentation, that the process for obtaining the easements was not procedurally unconscionable, and that the terms of the easements are not substantively unconscionable. Appellants' Br. 5. Plaintiffs have waived any appeal of those rulings. *Smith*, 106 Wn.2d at 451-52; RAP 10.3(a)(4), (6).

and even if it was, plaintiffs failed to create a genuine issue of material fact that would prevent summary judgment. The trial court's order granting summary judgment to the Port should be affirmed.

## A. Standard Of Review For Summary Judgment.

This court reviews the trial court's summary judgment order *de novo*. *Moeller*, 173 Wn.2d at 271.

## B. The Port Is Statutorily Authorized To Acquire Interests In Real Property, Including Express Avigation Easements.

Port districts are municipal governments authorized to acquire private property for public use through condemnation proceedings. RCW 53.08.010. If a taking has allegedly occurred without the institution of formal eminent domain proceedings, a plaintiff may sue for inverse condemnation. *Phillips*, 136 Wn.2d at 957. However, port districts are not limited to acquiring property through condemnation. They have the statutory authority to buy, sell, or exchange fee or fractional property interests and may therefore acquire property rights through negotiated purchases. Ch. 53.08 RCW.

Port districts are also statutorily authorized to conduct airport noise mitigation programs. Ch. 53.54 RCW. Participants in the Port's program for Sea-Tac received property improvements such as noise insulation, new windows, new doors or, in certain cases, cash payments. CP 2128-29. Because of the Washington Constitution's prohibition on gifting of public

resources, the legislature expressly required that property owners who received benefits from an airport noise mitigation program convey an avigation easement in consideration for the benefits they received. RCW 53.54.030(3). These statutes provide another mechanism by which ports can acquire interests – avigation easements – in private property.

**C. Valid Avigation Easements Preclude Plaintiffs' Claims.**

As explained by the trial court, our Supreme Court has recognized that a plaintiff may be barred from a claim for inverse condemnation if the Port has obtained an avigation easement – even if the easement was obtained prescriptively. *Petersen*, 94 Wn.2d at 484-85; *see Highline*, 97 Wn.2d at 12. Such easements preclude claims of inverse condemnation, nuisance, and trespass as long as the Port operates within the scope of the easement. *Institoris v. City of Los Angeles*, 258 Cal. Rptr. 418, 425-26 (Cal. Ct. App. 1989); *Christie v. Miller*, 719 P.2d 68, 70 (Or. App. 1986).

Here, by granting avigation easements to the Port, the Easement Plaintiffs conveyed away the property right that is a necessary predicate to their claims. *United States v. 13.98 Acres*, 702 F. Supp. 1113, 1114-15 (D. Del. 1988) (by acquiring and paying for an avigation easement the United States "already own[ed] one stick (i.e. the easement) in the bundle of rights comprising the subject property"). "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled

to compensation." *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002); *accord Granite Beach Holdings, L.L.C. v. Dep't of Natural Res.*, 103 Wn. App. 186, 205, 11 P.3d 847 (2000). It is undisputed that the Port is acting well within the scope of the easements. Appellants' Br. 42-43; CP 1260-72, 2173-2692.

In an effort to avoid summary judgment, the Easement Plaintiffs argue that this is a constitutional waiver case. Even if that was true, the standard cited by Appellants (and the trial court) is not applicable. The "voluntary, knowing, and intelligent" standard is a criminal law standard. *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 395, 858 P.2d 245 (1993). The test for whether a constitutional waiver is valid depends on the circumstances and the particular right at issue. *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). Some rights require a more stringent test than others. *Id.*; *Yakima*, 122 Wn.2d at 395 (waiver of first amendment right requires at least a knowing waiver); *see also id.* at 388 (right waived because all persons are charged with constructive knowledge of state statutes).

Appellants cite no authority for the proposition that a real estate transaction requires a constitutional waiver analysis simply because it involves a government agency. Appellants' argument would turn any real estate dealing between the government and the public into a constitutional

question. This is not supported by legal authority and provides no basis for reversing the court's summary judgment order.

### D. The 79 Easement Plaintiffs Who Purchased Properties Already Subject To Recorded Avigation Easements Cannot Assert Waiver Arguments.

Even applying Appellants' improper waiver standard, they did not create a genuine issue of fact on summary judgment. Appellants conspicuously omit the fact that of the 126 Easement Plaintiffs, 79 of them bought their properties *after* the avigation easements were conveyed by prior owners and *after* the avigation easements were recorded against title on their properties. CP 2178-80, 3641, 3944. These 79 Easement Plaintiffs did not make any decision on the basis of allegedly deficient disclosures from the Port or involuntarily convey an easement.

By purchasing their properties subject to previously recorded easements, these 79 Easement Plaintiffs accepted and ratified the terms of the easements, making them enforceable as written. *People for Pres. & Dev. of Five Mile Prairie v. City of Spokane*, 51 Wn. App. 816, 824-25, 755 P.2d 836 (1988). With the undisputed evidence that operations at Sea-Tac are within the scope of the easements, the trial court properly dismissed the claims of these 79 Easement Plaintiffs.[10]

[10] These 79 Easement Plaintiffs also submitted no declarations or other evidence in opposition to the Port's summary judgment motion. CP 3839-43.

### E. Property Owners Voluntarily Conveyed Avigation Easements When They Participated In The Noise Remedy Program.

As to the Easement Plaintiffs who actually conveyed easements to the Port, they failed to establish a genuine issue of material fact regarding the voluntary nature of the easements. Twenty of them filed no declarations or other evidence in response to the motion, so there was no basis for finding any issue of fact. CP 3839.

The trial court correctly rejected the efforts of the remaining 27 Easement Plaintiffs to avoid enforcement of their bargains. The Port had no ability to require property owners to join in the noise remedy program, and they confirmed that participation was entirely voluntary when they signed up for the program. CP 2131; *e.g.*, CP 2140 ("I understand that this is a voluntary program, and that submittal of this application is not binding in any way."). Participants were informed about the need to execute an avigation easement in exchange for receiving benefits under the program from the outset. CP 2131-32. Becoming a participant was a multi-step process that typically extended over several weeks. CP 2131. If the participant opted not to proceed with the noise improvements, they withdrew from the noise remedy program and no easement was conveyed. CP 2131-32.

Participants who chose to continue signed a "Homeowner Participation Agreement Final Approval", in which they acknowledged

the benefits of the program, the need to convey the avigation easement, and the property owner's continuing ability to withdraw from the program. The Final Approval provided, in part:

> 1A. Avigation Easement and Subordination Agreement. In consideration for participating in and receiving the benefits of the Program, *Homeowner agrees to convey to the Port an avigation easement which will be recorded* upon receipt by the Port of a fully executed Sound Insulation Contract[.]
>
> 1B. Homeowner Program Participation Payment. The Port, *in consideration for Homeowner's conveyance of the avigation easement*, agrees to pay one hundred percent (100%) of the Port-approved costs of noise insulating the Premises and to allow Homeowner to participate in the Program[.]
>
> 11. Withdrawal. *Homeowner may withdraw from the Program at any time prior to the Sound Insulation Contract being fully executed by* the Homeowner and Contractor. [...]

CP 2131-32 (emphasis added). Participants subsequently signed a contract with a sound insulation contractor to make the authorized improvements. CP 2132.

At the end of this process, each participant executed an avigation easement before a notary wherein he or she acknowledged that it was his

or her "free and voluntary act."[11] CP 2132. The avigation easement was then recorded and became part of the title history of the property.

Appellants nevertheless argue that they had no realistic choice but to participate in the program[12] and that they would face consequences if they withdrew. Appellants' Br. 50-52. The Easement Plaintiffs were not forced to participate. And, if they chose not to participate or chose to withdraw from the program, they were free to pursue claims against the Port for any alleged taking from airport noise. The "penalties" for withdrawing argued by Appellants did not preclude such claims.[13] The Easement Plaintiffs failed to create a genuine issue of material fact showing that the easements were not voluntarily conveyed to the Port.

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[11] A notary's certificate of acknowledgement is *prima facie* evidence that the party who executed the instrument acted freely and voluntarily. It may only be overcome by clear and convincing evidence. *Chaffee v. Hawkins*, 89 Wash. 130, 138-40, 157 P. 35 (1916); 1 Wash. Real Property Deskbook § 5.5(7) (4th ed. 2009). Of the 126 Easement Plaintiffs, 99 presented no testimony whatsoever in opposition to the motion. CP 3641. Moreover, unsupported, self-serving testimony is insufficient to overcome a notarized acknowledgement. *Chaffee*, 89 Wash. at 138 ("otherwise there would be but slight security in titles to land" (internal quotations omitted)). These plaintiffs have no basis to avoid summary judgment on the issue of whether they voluntarily granted the easements.

[12] Notably, the Easement Plaintiffs present conflicting characterizations of the airport noise affecting their properties before and after the Third Runway opened. While there was apparently "little noise" or interference with homeowner's enjoyment of their properties before the Third Runway opened (Appellants' Br. 6), they simultaneously argue that these same conditions were so onerous as to give them "no meaningful choice but to enroll" in the Port's noise remedy program (Appellants' Br. 51).

[13] *See* Appellants' Br. 45-46. Moreover, it was entirely reasonable for the Port to enforce certain consequences if a homeowner withdrew late in the process, such as the repayment of construction costs already incurred by the Port. CP 2146. The plaintiffs do not have a right to – and the Port cannot give – free property improvements at public expense. Wash. Const. art. VIII, §§ 5 & 7.

### F. The Easement Plaintiffs Knew The Easements Released Past Claims For Damages And Authorized Future Airport Operations Over And In The Vicinity Of Their Property.

The Easement Plaintiffs also claim that they did not know that by conveying the avigation easements, they were foregoing the right to be compensated for the taking of a property interest. Appellants' Br. 48-50. But they received repeated disclosures that conveying an easement was required as a condition of and in consideration for the noise remedy program benefits. CP 2132. As required by statute, the easements all included language waiving past claims for damages. CP 2182-2624. And there was no question about the future activities that were permitted by the easements. As the trial court determined: "the terms of the avigation easements were prominently displayed in clear, detailed language, including the fact that the benefits of the easement applied to 'any additions' to the Airport." CP 3945.

#### 1. The Avigation Easements Plainly Stated The Scope Of Rights The Easement Plaintiffs Conveyed To The Port.

Two forms of easement were at issue in this case. First, easements conveyed before 1993 granted "an unconditional right of easement for the operation of all aircraft and for all noise or noise conditions therewith." Laws of 1974, 1st Ex. Sess., ch. 121, p. 338 (CP 2686-88); *e.g.*, CP 2415-17. Second, after the statute was amended to its current form in 1993, the Port adopted a new "DNL Easement" that (1) allowed unlimited airport

operations up to a specified DNL level at each property and (2) allowing a limited right for future recovery if noise from operations exceeded the specified DNL level.[14] CP 2132-33; *e.g.*, CP 2300-03.

Both types of avigation easements expressly granted the Port the permanent right to use the airspace over and around the Easement Plaintiffs' properties and authorize the Port as follows:

- Use of Airspace. The Port is granted the right of "free and unobstructed use and passage of all types of aircraft …, with such use and passage to be unlimited as to frequency, type of aircraft, and proximity."

- Geographic Scope. The Port is granted "a permanent … easement … through the airspace over or in the vicinity of [plaintiffs' properties]".

- Benefited Property Includes Additions to Sea-Tac. The Port is granted an easement for "the benefit of the real property now commonly known as Seattle-Tacoma International Airport ("Airport"), including any additions thereto wherever located, hereafter made by the Port or its successors and assigns …"

This grant language is found in each of the avigation easements. CP 2182-2624. The avigation easements further made clear that, going forward, the burden imposed on the Easement Plaintiffs' properties included events "which may be alleged to be incident to or result from the flights of

[14] Even if such a showing is made, the DNL Easement remains "in full force and effect as to all noise and noise associated conditions falling within the Easement Level," allowing recovery for only the incremental excess conditions. *E.g.*, CP 2151-52.

aircraft over or in the vicinity of the Premises or in landing at or taking off from the Airport." CP 2182-2624.

### 2. The Easement Plaintiffs Are Responsible For Knowing The Legal Effect Of The Documents They Signed.

The Easement Plaintiffs claim that the disclosures they received did not tell them they would be waiving their constitutional right to compensation for the property interest they were conveying. Appellants' Br. 48-50. A party to a contract that he or she has voluntarily signed will not be heard to declare that he or she did not read it, or was ignorant of its contents. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 799, 64 P.3d 22 (2003) ("A party who signs an instrument manifests assent to it and may not later complain about not reading or not understanding."). The trial court correctly ruled that, as the counter-party to the easement agreement, the Port had no obligation to explain its legal effect to the other party. CP 3945 (citing *Prest v. Adams*, 142 Wash. 111, 252 P. 686 (1927)). Relying on the other side to explain the legal effect of a contract is "folly," and one who so relies "cannot ask the law to relieve him from the consequences." *Prest*, 142 Wash. at 116 (quoting *Fish v. Cleland*, 33 Ill. 238, 243 (Ill. 1864)); *accord Bond Adjustment Co. v. Anderson,* 186 Wash. 226, 233-34, 57 P.2d 1046 (1936).

At bottom, this case is not about a waiver of constitutional rights, but a garden variety conveyance of a property right in return for valid

consideration.[15] Both the Port and the Easement Plaintiffs must now abide by their bargain. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004). Because the Port undisputedly has not exceeded the scope of the rights it was granted, the Easement Plaintiffs were not entitled to further compensation. The trial court's order granting summary judgment on the avigation easements should be affirmed.

## VI. ARGUMENT: THE TRIAL COURT PROPERLY DISMISSED THE NOISE EXPOSURE MAP PLAINTIFFS ON SUMMARY JUDGMENT

Appellants assign error to the trial court's grant of summary judgment to the Port on its NEM motion, dismissing 111 plaintiffs' (the "NEM Plaintiffs") claims with prejudice. Appellants' Br. 3-4. The trial court's decision should be upheld because (1) it is undisputed that federal law requires dismissal of those plaintiffs' claims that are based on noise from airport operations, and (2) in the face of a summary judgment motion seeking to dismiss them from the case entirely and with prejudice, those plaintiffs came forward with no evidence to show that they had any other type of claim.

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[15] There is no question that the homeowners received sufficient consideration in return for the conveyance of the avigation easements. The Port's cost for installing the noise insulation packages varied, but was consistently several thousand dollars per home. CP 2128-29. For example, the Port paid $20,403.77 to insulate the home of Miriam Bearse's predecessor-in-interest, Mr. Faccone. *Id.* For homes that could not be adequately insulated, such as mobile homes, the Port paid cash in exchange for the avigation easement. CP 2128.

### A. Federal Law Provides Protection From Liability For Airport Operators That Publish Notice Of FAA-Approved Noise Exposure Maps.

#### 1. Federal Law Incents Airport Operators To Quantify Noise Exposure Levels And Mitigate Noise Effects.

The Aviation Safety and Noise Abatement Act ("ASNAA") provides financial and legal incentives for airports to study their noise environments and proactively implement noise mitigation programs. 49 U.S.C. §§ 47501-47510. ASNAA also imposes conditions on private litigants seeking to sue for damages allegedly caused by airport operations. 49 U.S.C. § 47506. The FAA implements ASNAA through the regulations adopted in 14 C.F.R. Part 150.

Under ASNAA and Part 150, an airport operator may prepare and submit to the FAA a noise exposure map and a noise compatibility program—*i.e.*, a Part 150 Study. 49 U.S.C. §§ 47503-47504; 14 C.F.R. Part 150. Once a noise exposure map has been approved by the FAA, ASNAA and Part 150 authorize airport operators to provide actual or constructive notice to the public of the noise levels shown on the map. 49 U.S.C. § 47506(b); 14 C.F.R. § 150.21(f)(2)(i).

After notice of an FAA-approved NEM is published, federal law precludes recovery against the airport operator on claims relating to airport operations unless the plaintiff proves: (1) a significant change in airport operations (2) that results in an increase in noise of at least 1.5 dB DNL at

(3) a property that was either (a) already experiencing an aircraft noise level of 65 dB DNL or more or (b) was previously below 65 dB DNL, but goes above 65 dB DNL as a result of the increase. 49 U.S.C. § 47506; 14 C.F.R. § 150.21(f). This showing is required "in addition to any other elements for recovery of damages." 14 C.F.R. § 150.21(f)(1).

### 2. The Port Published Notice Of Two FAA-Approved Noise Exposure Maps Relevant To This Motion.

The Port updated its Part 150 Noise Compatibility Plan in July 1993 and December 2001. As part of those updates, the Port published notice of FAA-approved NEMs as permitted by FAA regulations. CP 3891. Many of the individual plaintiffs purchased their homes after publication of one of the Port's NEMs. CP 3903, 3906-11.[16]

### 3. Airport Noise At The NEM Plaintiffs' Properties Did Not Exceed The Levels Published On The NEMs.

The undisputed facts, established through the process stipulated to in the case management order, demonstrated that the DNL levels at the NEM Plaintiffs' properties were all below the levels disclosed on the applicable noise exposure maps. CP 4268-69, 4272-78. At the close of the NEM hearing, plaintiffs' counsel conceded that the Port was entitled to

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[16] The trial court issued its ruling granting the avigation easement summary judgment on the same day that the Port filed the NEM motion. CP 3862, 3947. A number of the individual plaintiffs both owned properties with avigation easements and had purchased their properties after the Port published notice of an NEM. After the avigation easement motion was granted, 111 plaintiffs remained who were affected by the NEM motion. CP 4280, 4283-88.

dismissal of the NEM Plaintiffs' claims based on noise from airport operations: "The Court: *Do you contest the fact that the Port is entitled to dismissal of noise claims by the 111 plaintiffs?* Mr. Cochran: *No.*" RP 254. Because the NEM Plaintiffs could not meet the showing required under ASNAA and Part 150, the trial court dismissed their noise-based claims. RP 257; CP 4550-51.

Appellants spend a significant portion of their opening brief arguing that the NEM statute does not preempt *non-noise* claims. Appellants' Br. 32-35. This was not the trial court's ruling. The trial court applied the plain language of the NEM statute to dismiss plaintiffs' claims for "*damages for noise* attributable to the airport." RP 257; CP 4550-51. Appellants do not appeal this finding. Appellants' Br. 4.

With respect to the NEM Plaintiffs' *non-noise* claims, dismissal was based on their failure to provide any evidence of such claims. RP 258; CP 4550-51. Accordingly, the only issue on appeal is whether the trial court properly dismissed those claims where the plaintiffs failed to support their opposition to summary judgment with any competent evidence. The trial court's decision should be affirmed.

### B. The Port's Summary Judgment Motion Asked For Dismissal Of The NEM Plaintiffs From The Case With Prejudice.

When the Port moved for summary judgment, it clearly requested dismissal of *all* of the NEM Plaintiffs' claims. CP 3848, 4550-51. The

Port's motion also expressly treated vibrations as low-frequency noise, stating that plaintiffs' causes of action depended on an "alleged increase in operations and the alleged 'heightened noise pollution' and *vibrations (i.e., low frequency noise)* caused by those operations." CP 3849 (emphasis added).

In response, the NEM Plaintiffs argued that their dismissal from the case was not proper because they had alleged claims for vibrations, emissions, soot, dust, and fear from operations on the Third Runway that were not covered by the NEM statute and regulations. CP 3953-54. To establish that an issue of fact existed as to these so-called "non-noise" claims, the NEM Plaintiffs submitted 27 declarations and spent nearly thirty percent of their opposition brief describing this testimony. CP 3954-60. But every one of the declarations was from a plaintiff who had been dismissed from the case when the trial court granted the Port's avigation easement summary judgment motion six weeks earlier. CP 4281.

None of the remaining NEM Plaintiffs submitted any discovery responses or testimony regarding their alleged non-noise claims. Plaintiffs had disclaimed any reliance on expert testimony for such claims. Plaintiffs' expert witness disclosures did not identify either an expert or any methodology for meeting their burden of showing that fumes, soot, or dust were being deposited on each plaintiff's property; that such deposits

came from aircraft using the Third Runway (as opposed to other sources); or that such deposits increased since the Third Runway opened. CP 4217. Because the NEM Plaintiffs failed to provide any evidence to show they had claims based on fumes, soot, or dust, the trial court properly entered summary judgment. *Mansfield v. Holcomb*, 5 Wn. App. 881, 883-86, 491 P.2d 672 (1971) (affirming dismissal because plaintiff relied on allegations, not evidence, to oppose summary judgment).

The NEM Plaintiffs also disputed in their opposition brief, without any supporting evidence, the Port's assertion that vibrations and noise are equivalent by arguing that their claims for vibrations are not claims based on noise. CP 3963-64. The Port properly responded in strict reply with argument and evidence that vibrations are nothing more than an effect caused by noise. CP 4269-71. The undisputed evidence established that vibrations are "noise" under the NEM statute.[17]

The course of these proceedings shows that the NEM Plaintiffs plainly understood the specific relief sought by the Port – dismissal of the NEM Plaintiffs from the case with prejudice – and recognized CR 56(e)'s requirement that a non-moving party must put forth sufficient, admissible evidence to support the existence of a material fact in issue. CR 56(e)

[17] Even if the court considered vibrations to be outside the scope of the statute, the NEM Plaintiffs still did not provide any competent evidence of such claims, just as they failed to do for claims based on alleged emissions, soot, dust, and fear.

(mandating that an "adverse party may not rest upon the mere allegations or denials of his pleading"); *see Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). Indeed, the NEM Plaintiffs had just been specifically reminded of this requirement in the trial court's avigation easement ruling. CP 3944.

Once the NEM Plaintiffs asserted the existence of non-noise claims as a defense to the Port's NEM Motion, they had the burden to come forward with competent evidence and create a genuine issue of material fact for trial. They did not do so. As the trial court observed:

> If the plaintiffs had presented *any evidence* that their property, or at least competent evidence, that their properties were subject to soot, emissions that were causally linked to the Third Runway, *then there would be material issues of fact and the Court would not grant a motion to dismiss those claims*. But, instead, the plaintiffs submitted numerous declarations or statements by other plaintiffs who are no longer affected by this motion, and *in the absence of any evidence from the non-moving parties, the Court believes that summary judgment should be granted to the Port*.

RP 258 (emphasis added); *see also* CP 4550 ("The NEM Plaintiffs did not provide the Court with evidence of any claims other than claims for "damages for noise attributable to the airport."). Applying the summary judgment rules to the record in this case, it was proper for the trial court to dismiss all of the NEM Plaintiffs' claims.

### C. Appellants Cannot Credibly Claim That They Had No Opportunity To Respond.

Appellants cannot now challenge the trial court's consideration of the Port's reply brief evidence or credibly argue they had no opportunity to respond. *See Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979) (failure to move to strike evidence constitutes waiver); *see also* RAP 2.5. In addition to the six weeks they had to file opposition papers, plaintiffs had another three weeks between the filing of the Port's reply and the hearing (instead of the standard 5 days under CR 56(c)). RP 236; CP 4250.

The Port called out in its reply brief the complete absence of any testimony from the plaintiffs affected by the motion to establish their non-noise claims. CP 4253. Plaintiffs never sought a continuance under CR 56(f) in order to obtain and provide those declarations, never requested leave to file a sur-reply, never attempted to supply competent declaration testimony or other evidence, and they abandoned their motion to strike, which they failed to serve on the Port or timely file. CP 4548-54. Appellants were not "severely prejudiced" in this case. Appellants' Br. 37. Plaintiffs had several options if the Port's reply papers raised concerns. They did nothing but stand on their allegations. The trial court did not err in dismissing their claims.

## VII. CONCLUSION

The trial court gave plaintiffs ample opportunity to meet their burden under CR 23 and carefully considered each of CR 23's requirements. Its decision to deny class certification was not an abuse of discretion and should be upheld. The trial court's decisions granting summary judgment to the Port on the avigation easement and noise exposure map defenses are supported by the law and undisputed facts. This Court should affirm.

RESPECTFULLY SUBMITTED this 12th day of February, 2014.

THE PORT OF SEATTLE
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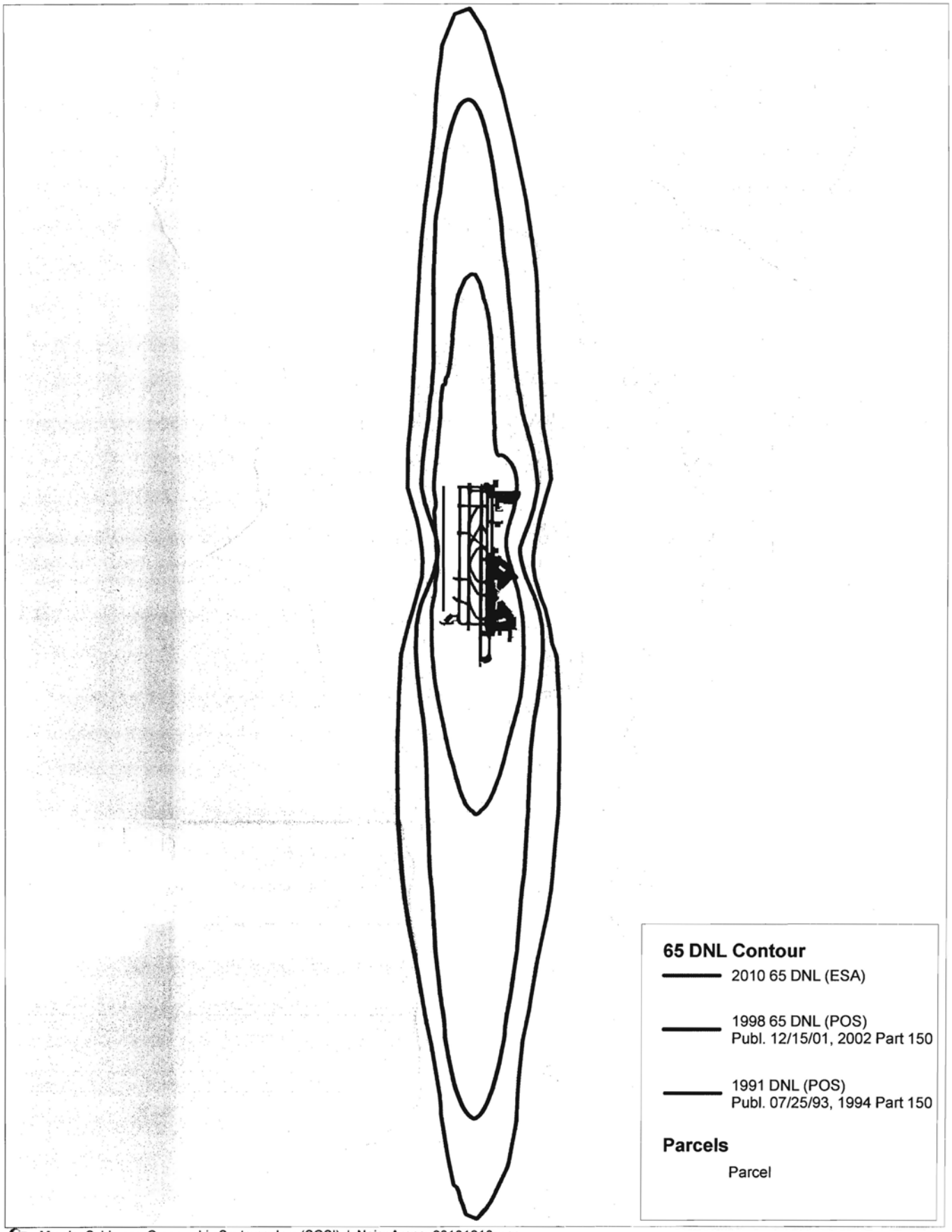
*Attorneys for Respondent The Port of Seattle*

# APPENDIX 1

# Decreasing Noise Over Time

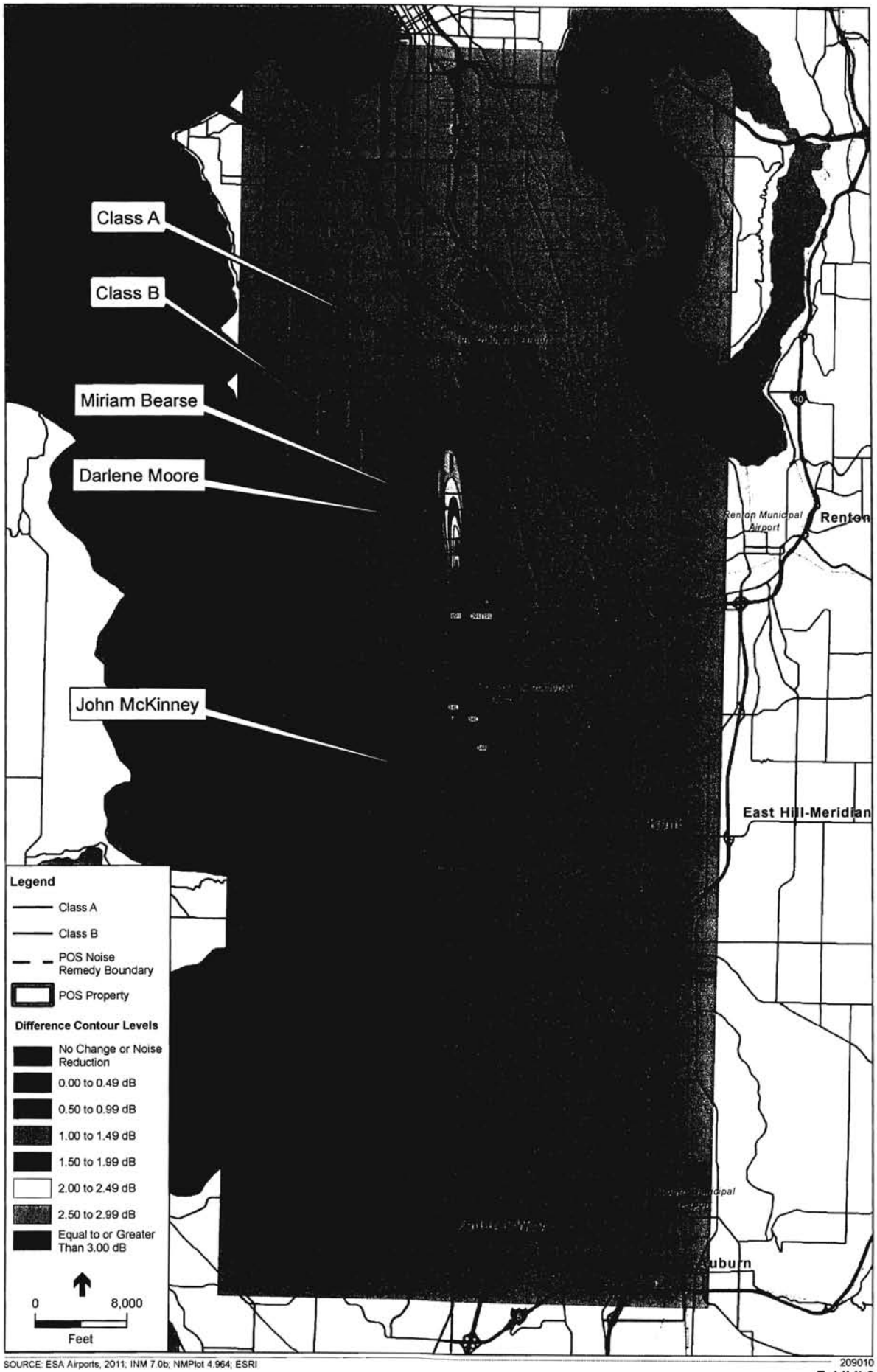
Seattle-Tacoma International Airport & Vicinity




Map by Schlosser Geographic Systems, Inc. (SGSI) | NoiseAreas_20101210.wor

**Exhibit 5**

# APPENDIX 2

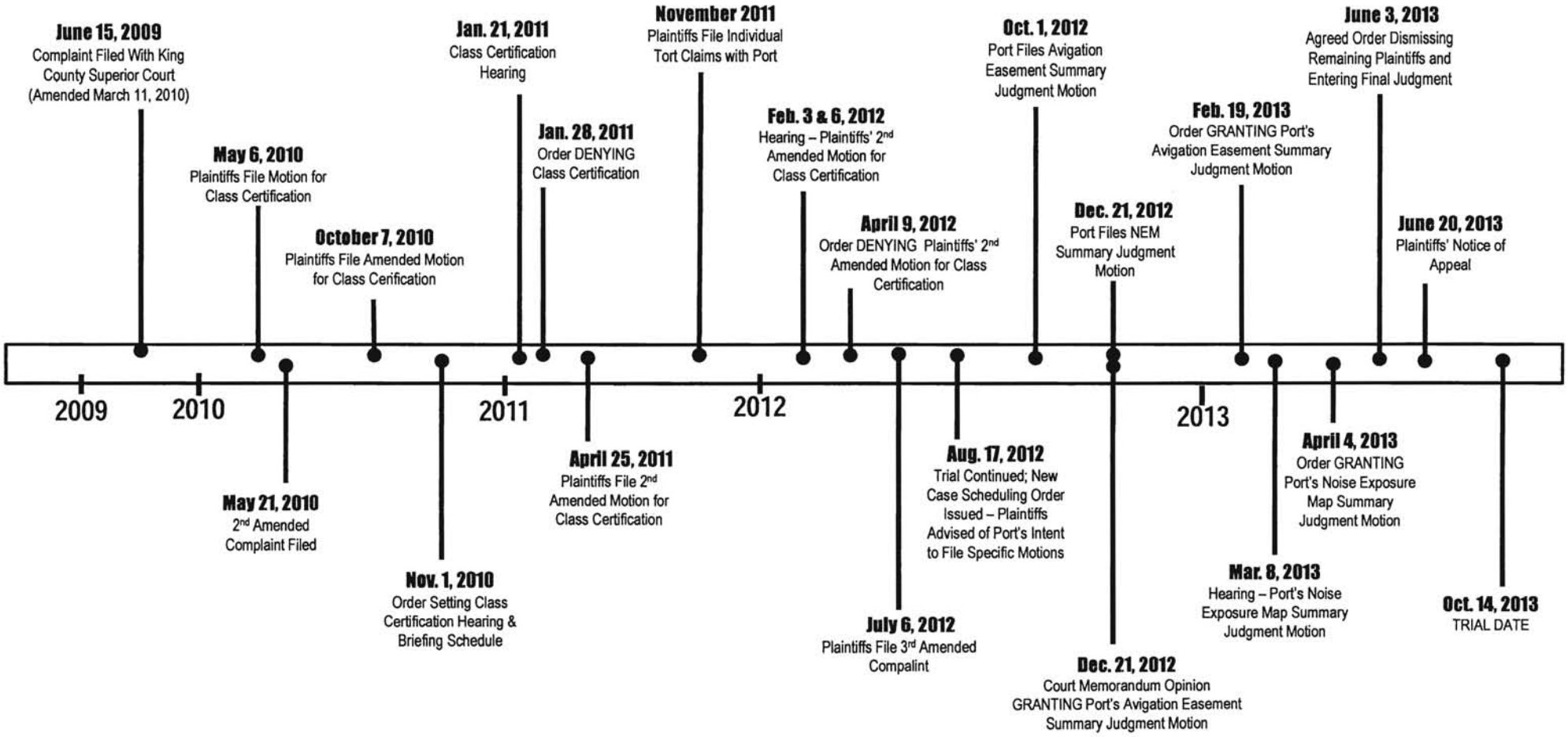



SOURCE: ESA Airports, 2011; INM 7.0b; NMPlot 4.964; ESRI

209010

**Exhibit 2**
2010 Actual versus 2007-2008 Actual Difference Contours

# APPENDIX 3




**PROCEDURAL OVERVIEW**

*Admasu, et al. v. Port of Seattle* – Trial Court: King County Superior Court – Case No. 09-2-22569-9

CP 1-18, 37-62, 165-81, 219-48, 314-18, 897-98, 1257-87, 1969-76, 2055-69, 2070-81, 2082-87, 2097-2127, 3844-62, 3933-47, 4294-4300, 4548-54, 4839-48, 4849-4914

# APPENDIX 4

C92C1 BZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| MARK STEVEN FAVRO, et al., Plaintiffs, v. THE PORT OF SEATTLE, a municipal corporation, Defendant. | NO. C92-1634Z ORDER |

THIS MATTER comes before the Court on plaintiffs' motion for class certification (docket no. 50). The Court, having considered plaintiffs' motion, defendant's response thereto, and all papers filed in support of and in opposition to plaintiff's motion, and having heard oral argument on June 11, 1993, hereby DENIES plaintiffs' motion for class certification.



Mullaney Ex. 1

Background

Plaintiffs seek a class certification in connection with their claims for inverse condemnation[1] brought on behalf of persons owning or who sold residential property in an area adjacent to the western boundary of Seattle Tacoma International Airport ("SeaTac"), commonly referred to by plaintiffs as the "Westside Area."[2] Plaintiffs seek to represent the following class:

> All present residential property owners in the Westside Area whose residential property rights were taken and/or damaged without just compensation by the operations of [SeaTac Airport]. In addition, all persons who sold property in the Westside Area after October 21, 1982, whose property rights were taken and/or damaged without compensation by the operation of SeaTac.

Plaintiffs' Amended Proposed Order. The plaintiffs allege that "[t]heir property rights and the property rights of members of the class, including the right to exclude strangers from using their property and the right to use, enjoy and dispose of their properties without interference, have been

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[1] Plaintiffs' complaint also alleges violation of federal substantive and procedural due process rights as a result of noise, vibration and pollution from SeaTac air operations. However, the plaintiffs seek class certification only as to their inverse condemnation claim under state law.

[2] The Westside Area as described by the plaintiffs is bordered by State Route 518 on the north, Des Moines Way S. and State Route 509 on the west, S. 176th Street on the south (with the addition of several dozen residences just to the south and west of where State Route 509 intersects S. 176th Street) and 12th Ave. S. on the east. Plaintiffs' Memorandum in Support of Motion for Class Certification ("Opening Brief") (docket no. 51) at p.3 fn. 1.

taken and damaged by the impacts of the noise, vibration and pollutants from SeaTac air operations, which has diminished the value of plaintiffs' property." Opening Brief at 4.

Plaintiffs contend that the Westside Area is a homogeneous community, and that, while the level of noise, pollution and vibration may vary within the community, there is no question that the entire Westside Area has been damaged by airport operations at SeaTac. The plaintiffs contend that they can prove through experts using multiple regression analyses and other accepted economic methodologies that the Westside Area, as a whole, and each individual parcel have suffered a diminution in market value caused by the defendant's conduct. Plaintiffs contend that the homogeneity of the Westside community distinguishes this case from other airport noise cases where courts have denied class certification.

The defendant Port of Seattle, on the other hand, argues that individual questions predominate over common questions in this case, as in all other airport noise cases, because there is variation in the impact of airport activities on individual parcels. The Port argues further that market values of real property are affected by a myriad of non-airport factors such as condition of the property, neighborhood amenities and reputation, upkeep, and location. The Port contends that the issues of causation and decline in market value are highly individualized and cannot be determined using class-wide

analyses. The Port questions the ability of plaintiffs' experts to use regression analysis or other economic methodologies to determine with any reasonable degree of certainty decline in market value attributable to SeaTac operations for each individual parcel in the Westside Area during the relevant time period. Such analysis, the Port asserts, has never been applied for the purposes proposed by the plaintiffs; moreover, the plaintiffs' experts themselves are uncertain that the economic models will yield reliable results as to individual properties in the Westside Area.

**Discussion**

I. Inverse Condemnation

A. In General. The term "inverse condemnation" is used to describe an action alleging a governmental "taking" or "damaging" of property under the Washington Constitution which gives property owners the right "to recover the value of property which has been appropriated in fact, but with no formal exercise of the power." Martin v. Port of Seattle, 64 Wn.2d 309, 310 n.1, 391 P.2d 540, 542 (1964) (action by 196 property owners for inverse condemnation against Port of Seattle for noise and vibration created by aircraft) (citing Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962)), cert. denied, 379 U.S. 989, 85 S. Ct. 701, 13 L. Ed. 2d 610, (1965).[3] A "taking" has occurred when government

[3] Under Washington law the courts do not make any significant distinction between a "taking" or "damaging" of a property right respecting the use and enjoyment of land. Martin, 64 Wn.2d at 309; 391 P.2d at 543. For purposes of

conduct interferes with the use and enjoyment of private property, and its market value declines as a result. Gaines v. Pierce County, 66 Wn. App. 715, 725, 834 P.2d 631 (1992) (citing Lambier v. Kennewick, 56 Wn. App. 275, 279, 783 P.2d 596 (1989)), review denied, 120 Wn.2d 1021, 844 P.2d 1017 (1993). However, in order to establish inverse condemnation, there must be a "taking" that is permanent or recurring. Northern P. R. Co. v. Sunnyside Valley Irrig. Dist., 85 Wn.2d 920, 924, 540 P.2d 1387, 1390 (1975). Thus, an inverse condemnation claim has two components: (1) a government's permanent or recurring interference with the use and enjoyment of property, and (2) a decline in market value caused by the government interference.

B. Causation. A causal relationship between governmental conduct and damage sufficient to constitute inverse condemnation must be shown in order to establish inverse condemnation under Washington law. Gaines, 66 Wn. App. at 726, 834 P.2d at 637. "At a minimum, the causal relationship required for inverse condemnation must include cause in fact as one of its components." Id. As a result, government conduct which does not cause damage to each plaintiff cannot constitute a "taking" for purposes of inverse condemnation.

C. Level of Interference. In Martin, the supreme court rejected the argument that the interference with

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this Order, the Court will refer only to a "taking."

property rights must be "substantial" before it can amount to a "taking." Rather, under Washington law, the plaintiff need only show a lowering of market value which reflects the lesser desirability of the land to the general public, i.e., to a ready, willing and able buyer. Martin, 64 Wn.2d at 319, 391 P.2d at 547.

D. Individual Proof. Plaintiffs' counsel acknowledged at oral argument that for the putative class to succeed on its inverse condemnation claim against the Port, it would have to establish that each property owner in the class has experienced interference with the use and enjoyment of his land and that such interference has caused a measurable decline in the market value of that owner's property during the period in question. Plaintiffs contend that despite the individualized nature of inverse condemnation claims under Washington law, class action treatment of their claims is appropriate. They argue that under the circumstances of this case, where the class constitutes a homogeneous community and the Port's own studies show that the entire Westside Area has experienced airport noise to some degree,[4] established methods of class-wide proof, such as multiple regression analysis, can be applied to measure individual impact and damages. Plaintiffs concede that "the Westside Area's claims will stand

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[4] See Exhibit 3 to Affidavit of Andrew S. Harris (docket no. 98).

or fall together on the existence of such class-wide proof." See Plaintiffs' Reply Brief at 2.

II. Requirements for a Class Action

The basic requirements for maintaining a class action are set forth in Fed. R. Civ. P. 23(a). They include: (1) numerosity of claimants; (2) commonality of questions of law or fact; (3) typicality of claims or defenses of representative parties; and (4) fair and adequate representation of the class by the representatives. In addition, for a Rule 23(b)(3) class action to be maintained, the court must find that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

Plaintiffs bear the burden of demonstrating that the Rule 23 elements are satisfied. Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1308-09 (9th Cir. 1977); Rios v. Marshall, 100 F.R.D. 395, 407 (S.D.N.Y. 1983). The Court concludes that while the elements of Rule 23(a) may be satisfied, plaintiffs have failed to meet their burden of demonstrating that the Rule 23(b)(3) requirements are met.

III. Predominance of Common Issues

Plaintiffs acknowledged at oral argument that no state or federal court had agreed to certify a class under Rule 23(b)(3),[5] or its state law counterpart, in an inverse condemnation action involving airport noise and interference. See, e.g., Ario v. Metropolitan Airports Com., 367 N.W.2d 509 (Minn. 1985); San Jose v. Superior Court of Santa Clara County, 12 Cal.3d 447, 115 Cal. Rptr. 797, 525 P.2d 701 (1974). See also Mattoon v. Norman, 633 P.2d 735 (Okla. 1981) (denial of class action in flood plain litigation). They claim, however, that this case is distinguishable from the others because: (1) the plaintiffs here, unlike the plaintiffs in other airport noise cases, constitute a well-defined, homogeneous, residential community; and (2) the homogeneity of the class enables experts to apply market regression analyses and other economic methodologies to calculate the diminution in market value for each individual property in the Westside

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[5] Plaintiffs cited Foster v. Detroit, 254 F.Supp. 655, 658 (E.D. Mich. 1966), aff'd, 405 F.2d 138 (6th Cir. 1968), as a case where class certification was deemed appropriate. Foster was decided under former Rule 23(a)(3), which existed prior to the 1966 amendments to the Federal Rules of Civil Procedure. The present Rule 23(b)(3), enacted in 1966, introduced the current requirement that there be a predominance of common issues. Foster was not an airport noise case and can be distinguished on its facts from the present case. After oral argument, plaintiffs provided the Court with a copy of a decision in Alvarado v. Memphis-Shelby County Airport Authority, No. 89-3001-4 BRO (W.D. Tenn. May 5, 1993) where the Court certified a class action for various issues including claims for inverse condemnation arising from the operation of the Memphis airport. The Court has reviewed the Alvarado decision and finds that the Alvarado court's very brief discussion of Rule 23(b)(3) is unpersuasive.

Area. Plaintiffs argue that the ability of the plaintiffs to use class-wide proof to establish individual damages obviates the need for individual inquiries on fact of damage and individual trials on actual damages.

Homogeneity of the class community has been a critical factor in airport noise cases but homogeneity is not dispositive under Rule 23(b)(3). In Ario, the proposed class consisted of current residential homeowners whose properties were located within the area defined as Zone 1 by the Minneapolis-St. Paul Metropolitan Noisemap Project. Id. at 512. Zone 1 was the area closest to the airport and was located at the ends of all three runways, and deemed to be subject to "severe and permanent" noise exposure. The court concluded that the common "severe and permanent" noise exposure shared by all class members was sufficient to satisfy the commonality requirement of the state law counterpart to Rule 23(a), but class certification was nevertheless inappropriate because individual issues predominated over common questions. The court reasoned that if the class members succeeded in establishing some diminution in market value caused by the airport noise for all properties in the class, it would still be necessary in the individual condemnation actions for each plaintiff to prove individual damages. "This proof would inescapably require resubmitting much of the same evidence that was presented in the class action to show diminution of market value as to all tracts."

Id. Moreover, determining diminution of market value in the class action would seriously affect the commonality of the issues to be tried in the class action.

> Class members who purchased their properties in different years have different issues of fact to be resolved. If, for example, plaintiff buys a Zone 1 house in 1980, he presumably buys at a market price already discounted for aircraft noise existing at that time. Plaintiff has no diminution in market value of his property unless he shows that the noise level has increased since 1980 and such increase has measurably depressed the market value of his property. To put it another way, each class member, to prove a taking, must show that an increase in the noise level since he acquired his property has diminished the market value of his property.

Id. The Ario court concluded that the uniqueness of real property in general and the individualized nature of proof requirements in an inverse condemnation case made the use of a class action inappropriate. Id. at 516.

In San Jose,[6] 525 P.2d 701, the class consisted of all real property owners situated in the flight pattern of the San Jose Municipal Airport. It included owners of residential, commercial and industrial properties, as well as vacant land. The court found an insufficient community of interest based on the diversity of usage and character. The court also rejected, however, a proposal by plaintiffs "to divide the parcels of land represented by the class into

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[6] San Jose involved California law codified in Section 382 of the Code of the California Civil Procedure which requires a "sufficient community of interest" to justify a class action and a showing of "substantial benefits both to the litigants and to the courts." 525 P.2d at 710.

subclassifications and then to determine, as a group, the diminution in value for all members in each subclassification." Id. at 711. The court found that given the many recognized factors combining to make up the uniqueness of each parcel of land, the number of subclassifications into which the class would have to be divided to yield a "meaningful result" would be substantial, and would probably approach the total number of parcels in the class. Id. The court concluded:

> [The] uniqueness factors weigh heavily in favor of requiring independent litigation of the liability to each parcel and its owner. Because liability here is predicated on the impact of certain activities on a particular piece of land, the factors determinative of the close issue of liability are the specific characteristics of that parcel. The grouping and treating of a number of different parcels together, however, necessarily diminishes the ability to evaluate the merits of each parcel. The superficial adjudications which class treatment here would entail could deprive either the defendant or the members of the class -- or both -- of a fair trial.

Id.

Both the Ario and San Jose courts recognized that no matter how "homogeneous" the putative class is, the individualized proof requirements in an inverse condemnation case and the uniqueness of real property in general make class action treatment inappropriate in such cases. Since the existence of individual damages is an element that must be proved to establish liability to the class for inverse condemnation, the "the individual questions and the common questions become so intertwined and interconnected as to make

them impossible of separation and impossible to weigh for assessment of predominance." Mattoon, 633 P.2d at 740. Unless common questions can be found to predominate, no Rule 23(b)(3) class action can be maintained.

This Court, in Halvorson v. Skagit County, C92-692WD, recently denied class certification to a proposed class of persons whose businesses or properties were damaged by flooding in Skagit County, Washington. In this case, as in Halvorson, although there are common questions, they do not predominate. Rather, individual questions concerning damage to each parcel by reason of the alleged taking predominate. As in Halvorson, "there are individual issues of causation, damages and defenses which are substantial enough to require a finding that the common issues, those that are common to all the potential claimants, do not predominate for purposes of Rule 23." Halvorson, Trans. of Proceedings, March 15, 1993 at 23.

Plaintiffs seek to distinguish Ario, San Jose, Mattoon and Halvorson and contend that their economic experts will establish both class-wide and individual diminution in market value. Plaintiffs contend that the introduction of multiple regression analysis to prove individual damages renders the traditional parcel-by-parcel examination unnecessary and obsolete. The Court is not persuaded by this argument.

The burden is on the plaintiffs to show that the economic analysis they have asked their experts to undertake is

reasonably likely to yield reliable information as to: (1) the level of interference attributable solely to airport noise, vibration and pollution for each parcel; and (2) the diminution in the value of each parcel caused solely by airport interference. Viewing the experts' declarations and deposition testimony in a light most favorable to the plaintiffs, the Court concludes that they have failed to meet this burden. The evidence shows that while multiple regression analysis can predict an average effect on property values for the entire community within a reasonable range of error, its ability to yield statistically reliable results for each individual parcel is in doubt. The plaintiffs' experts admit that they do not know at this time whether they will be able to treat the Westside Area as a single residential housing market or whether it will be necessary to create numerous subgroups. Whitelaw Dep. at 15. Plaintiffs' experts are also unable to determine which unique attributes of individual properties or groups of properties, if any, would have to be included in the economic model to obtain individual damage calculations falling within a reasonable range of error. Whitelaw Decl. in Support of Plaintiffs' Reply Brief at 5. Plaintiffs' experts also acknowledge that the accuracy of the model's results as to diminution in market value of individual properties turns on the accuracy of information on airport noise and other interference factors for each relevant time period. Whitelaw Dep. at 72. The availability of such

information for each relevant time period is unknown. Based on the speculative nature of this endeavor, the Court concludes that plaintiffs have failed to show that multiple regression analysis will yield reasonably accurate results as to the diminution in market value experienced by individual class members during the relevant time periods.[7]

Even if the plaintiffs had established that market regression analysis would yield the desired results as to each individual parcel, the Court would still not find that common issues predominate over individual questions. The availability of a market regression analysis as a method of proof for plaintiffs does not preclude the defendants from introducing expert and other evidence pertaining to individual properties. In fact, if this case proceeded as a class action, the defendants would have every incentive to disprove the model's results by showing that some parcels, as a result of unique external factors and individual qualities, have not experienced any diminution in value. Thus, the Court concludes that the individual questions and the common

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[7] The Court's determination that plaintiffs have failed to meet their burden of proof should not be construed in any way as a comment on the qualifications or reputation of plaintiffs' experts or on the validity of multiple regression analysis. Likewise, this decision should not be construed as a ruling on the admissibility of any such market regression analysis at trial.

questions are so intertwined in this case as to make them impossible to separate. See Mattoon, 633 P.2d at 740.[8]

III. Superiority of Class Action

Even if the Court were to find that common questions predominated over individual questions, a Rule 23(b)(3) class action cannot be maintained unless the Court also finds that a class action is superior to other methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3). In this case, the Court concludes that a class action is not superior.

If a class is certified, the plaintiffs, in order to establish liability, must prove that each class member has experienced an interference with the use and enjoyment of his or her property as a result of airport operations, and that such interference has resulted in some measurable diminution in market value of that property. Plaintiffs intend to establish these elements using class-wide proof. The plaintiffs concede that if the multiple regression analysis

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[8] Plaintiffs also rely on several toxic tort cases where courts have found class certification appropriate. The Court finds In re Fernald Litigation, 1986 WL 81380 (S.D. Ohio 1986), unpersuasive since the court certified the class under Rule 23(b)(1)(A) and specifically declined to discuss Rule 23(b)(3). The Court is equally unpersuaded by the July 9, 1992 Order in the state court case of Escamilla v. Asarco, Inc., Case No. 91-CV-5716 (Colo. Dist. Ct.). Escamilla differs from this case in that the property owners in that case did not assert an inverse condemnation claim, and thus it was not necessary for each property owner in the class to show both interference and individual damage. The court noted that under the facts of that case, the plaintiffs could recover "whether or not any Plaintiff's property has in fact been physically affected at all."

fails to establish both interference and diminution in market value as to each property in the Westside Area, the entire class is barred from recovery. Under such circumstances, members of the class with meritorious claims would not be entitled to recover. Thus, a class action could substantially penalize claimants with valid claims. Moreover, even if the class members established liability, there would be a substantial duplication of effort in the damage phase of the trial relating to each individual parcel.

There are alternative procedures available which are superior to the class action approach. For example, any Westside Area resident who wishes to pursue an inverse condemnation claim may join the named plaintiffs in this litigation, or bring a separate action in state or federal court. All plaintiffs joining in this action may then proceed to trial using multiple regression models or other methods of proof in their attempt to establish liability. The initial trial might involve five to ten representative parcel owners. If they are successful, individual damage trials will follow. Under this scenario, other property owners bringing later claims may benefit from the Court's earlier findings and may not be required to litigate the same issues again. Moreover, in the event liability is not established as to one or more of the parcel owners, such findings will not bar other property owners who may have legitimate claims. The Court concludes that after consultation with counsel, the Court will be able

to formulate procedures for the handling of these pending claims which will be affordable and fair to all litigants and superior to a class action proceeding.

For these reasons, the Court concludes that plaintiff's motion for class action certification should be DENIED.

The Court schedules a status conference with counsel for July 16, 1993 at 2:00 p.m. to establish deadlines for the joinder of additional parties to this litigation and to discuss alternative procedures for the trial of these claims.

IT IS SO ORDERED.

The Clerk of this Court is directed to send uncertified copies of this Order to all counsel of record.

DATED this 24th day of June, 1993.

Thomas S. Zilly

THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

# APPENDIX 5

2012 WL 3705171
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Brandon BEAL, Plaintiff,
v.
LIFETOUCH, INC., et al., Defendants.

No. CV 10–8454–JST (MLGx). | Aug. 27, 2012.

**Attorneys and Law Firms**

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**Opinion**

**ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION (Doc. 95)**

JOSEPHINE STATON TUCKER, District Judge.

***1** Before the Court is a Motion for Class Certification ("Motion") filed by Plaintiff Brandon Beal ("Plaintiff" or "Beal"). (Mot., Doc. 95.) Defendants Lifetouch, Inc. ("LTI"), Lifetouch National School Studios, Inc. ("LNSS"), and Lifetouch Church Directories and Portraits, Inc. ("LCD") (collectively, "Defendants" or "Lifetouch") filed an Opposition. (Opp'n, Doc. 101.) Plaintiff replied. (Reply, Doc. 108.) Having read and considered the papers, and taken the matter under submission, the Court DENIES Plaintiff's Motion. As a former employee, Plaintiff lacks standing to seek injunctive relief, and therefore is an inadequate representative of those current employees seeking injunctive relief. Furthermore, while Plaintiff would be an adequate representative of a class comprised only of former employees, Plaintiff fails to provide evidence that such a class meets the Rule 23 numerosity requirement.

**I. Background**

LNSS is in the school portrait business, photographing preschool, elementary school, junior high school, and senior high school students. (First Am. Compl. ("FAC") ¶ 16, Doc. 10.) Similarly, LCD is in the business of taking portraits for religious organizations and their members. (*Id.* ¶ 17.) LTI is the parent company of LCD and LNSS. (Kramer Decl. ¶ 5, Doc. 101–1.)

Plaintiff, a resident of Riverside, California, was hired by LNSS in September 2005, as a photographer. In his position, he carried equipment, staged, posed and took photographs, and completed paperwork or order forms while on-site. (Beal Decl. ¶ 3, Doc. 95–19.)

Plaintiff filed this class action on November 5, 2010, asserting claims on behalf of himself and those similarly situated for violations of the California Labor Code ("California Labor Code claims"), including failure to indemnify, in violation of California Labor Code § § 226 and 2802; failure to pay drive time wages, in violation of California Labor Code § 204; failure to pay overtime compensation, in violation of California Labor Code § 1194, *et seq.;* missed meal and rest breaks, in violation of California Labor Code §§ 200, 226.7, 512; failure to furnish an accurate, itemized wage statement, in violation of California Labor Code § 226; failure to compensate for all hours worked, in violation of California Labor Code § § 200, 226, 226.7, 500, 1197, 1194, and 1198; and failure to pay compensation upon termination, in violation of California Labor Code § § 201–03. (Compl., Doc. 1; FAC.) Plaintiff also asserts a claim for violation of California Business & Professions Code § § 17200, *et seq.,* and remedies under the Private Attorney General Act of 2004 ("PAGA"), California Labor Code § § 2698, *et seq.* (*Id.*)

On February 12, 2011, Plaintiff's employment with LNSS was "permanently terminated," as it had been on several previous occasions due to seasonal layoffs. (Beal Decl. ¶ 2.)

On February 10, 2012, Plaintiff filed this Motion, seeking to certify the California Labor Code claims on behalf of a class under Rule 23(b)(3) ("the Proposed Class"), defined as follows:

> ***2** All persons who have been, or currently are, employed by Defendants in California during the Class Period who were classified by Defendants as non-exempt (whether paid hourly or on salary) and who held, or hold, the position of photographer or any other

> title having job duties involving the carrying of photographic equipment, the staging, posing or taking of photographs, on-site completion of paperwork or order forms, and/or the performance of any other on-site work related to photographic activities, Excluded from the [Proposed] Class are employees who regularly work at a permanent and fixed studio location.

(Mot. at 10–11.) Plaintiff also seeks to certify a subclass comprised of "[a]ll [Proposed] Class members whose employment with Defendants terminated, including those terminated as a result of seasonal lay-off." (*Id.* at 11.)

**II. Legal Standard**

"To obtain class certification, a class plaintiff has the burden of showing that the requirements of Rule 23(a) are met and that the class is maintainable pursuant to Rule 23(b)." *Narouz v. Charter Commc'ns, LLC,* 591 F.3d 1261, 1266 (9th Cir.2010). "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, ——, 131 S.Ct. 2541, 2550, 180 L.Ed.2d 374 (2011). Under Rule 23(a), the party seeking certification must demonstrate:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). "Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Dukes,* 131 S.Ct. at 2548. Rule 23(b) is satisfied if:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

***3** Fed.R.Civ.P. 23(b).

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes,* 131 S.Ct. at 2551. This requires a district court to conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." *Id.*

**III. Discussion**

Plaintiff seeks to certify the Proposed Class under Rule 23(b)(3), but he seeks both monetary damages and injunctive relief to modify the employment practices complained of in the FAC. Although Plaintiff acknowledges in his moving papers that LNSS has changed some of the offending practices, Plaintiffs argues that LCD has not changed its practices, and that some of LNSS's new policies still fail to comply with the law. (*See* Mot. at 4, 6.) Notably, Plaintiff has not withdrawn his request for injunctive relief. In fact, under the facts of this case, injunctive relief is not only significant, but could very well predominate, as current employees "have a substantial claim for injunctive relief because they seek to end long-standing employment practices." *Gardner v. Shell Oil Co.,* No. C 09–05876 CW, 2011 WL 1522377, at * 6 (N.D.Cal. Apr.21, 2011).

In a class action, plaintiff bears the burden of showing that at least one named plaintiff has standing with respect to each form of relief sought. *Ellis v. Costco Wholesale Corp.,* 657 F.3d 970, 978 (9th Cir.2011). Here, because Beal is the only

named plaintiff, he must have standing for both monetary and injunctive relief. However, as a former employee, Plaintiff "do [es] not have standing to seek injunctive relief," and therefore, cannot adequately protect the interests of a class of current and former employees. *Id.* at 986.

For the first time in the Reply, Plaintiff acknowledges the impact of his status as a former employee on his standing to pursue injunctive relief. [1] (Reply at 15.) Plaintiff attempts to distinguish himself from the former employees in *Ellis* on the basis that he "remains a shareholder of Vested Benefits in the Lifetouch, Inc. Employee Stock Ownership Plan, 'ESOP,' currently valued at more than $23,000." (*Id.*) Because of this ownership interest, Plaintiff argues, "Plaintiff has a significant financial interest in representing the interests of current LNSS and LCD employees as well as the continued validity and profitability of the Lifetouch companies, which includes the necessity of their complying with California wage and hour laws." (*Id.* at 16.) However, Plaintiff likely does not have standing as a shareholder to pursue injunctive relief for alleged noncompliance with wage and hour laws. *See Foust v. Safeway Stores, Inc.*, 556 F.2d 946, 947 (9th Cir.1977) (holding that a shareholder does not have standing to seek injunctive relief under Title VII against defendant for defendants' alleged discriminatory employment practices). Even if Plaintiff did have standing as a shareholder, the injury to Plaintiff's financial interests as a result of Defendants' employment practices is not the same type of injury suffered by current employees. *See Wal–Mart Stores, Inc. v. Dukes*, —— U.S. ——, ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) ("Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury.") (citation and internal quotation marks omitted).

1 The Court recognizes that "LNSS and LCD both discharge or 'layoff' employees at various times throughout the year (because of the seasonal nature of Defendants' business)." (Mot. at 8–9.) In line with this practice, Plaintiff states in his declaration that before the most recent termination of his employment, his "employment with LNSS had previously been terminated on numerous occasions during the Class Period .... Upon layoff at the end of each photography season, [he] had to be re-hired and [he] was also terminated at the end of that photography season." (Beal Decl. ¶ 2, Doc. 95–19.) However, Plaintiff has not been employed by LNSS since February 2011, and has not represented that he intends to work for LNSS in the future. Accordingly, Plaintiff is squarely a former employee.

***4** In *Ellis*, the Ninth Circuit suggested that the district court certify a Rule 23(b)(2) class for equitable relief, on behalf of current employees only, and a Rule 23(b)(3) class for monetary damages, on behalf of current and former employees, in order to deal with the fact that former employees do not have standing for injunctive relief. 656 F.3d at 986, 988. Such a solution was possible in *Ellis* because the proposed class representatives included both current and former employees. *Id.* at 985–86. Here, however, Plaintiff is the only proposed class representative, so certifying a class for injunctive relief and a class for monetary damages is not a possibility. Nor can the Court certify only a class for monetary damages because the claims of current employees would be impermissibly split. *See In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig.*, 270 F.R.D. 521, 531 (N.D.Cal.2010) ( "Claim splitting is generally prohibited by the doctrine of res judicata ... [and] class certification should be denied on the basis that class representatives are inadequate when they opt to pursue certain claims on a class-wide basis while jeopardizing the class members' ability to subsequently pursue other claims.") (citation and internal quotation marks omitted). Accordingly, the only class the Court could certify for which Plaintiff would be an adequate representative is a class of former employees. However, Plaintiff has affirmatively declined to provide the number of former employees, and therefore, such a class would not meet the numerosity requirement. (*See* Reply at 5.) [2]

2 Plaintiff asserts in his Reply that "Defendants also state, *for some unknown purpose,* that there is no breakdown of the number of members of the proffered subclass [of former employees], without showing why this would be required." (Reply at 5 n. 5 (emphasis added) (internal citation omitted)). However, a subclass "must independently meet the requirements of Rule 23 for the maintenance of a class action." *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir.1981). Therefore, despite Plaintiff's assertion to the contrary, the number of former employees included in the proffered subclass is relevant.

Because neither the Proposed Class nor any subclass meets the requirements of Rule 23, the Court DENIES Plaintiff's Motion.

**IV. Conclusion**

For the foregoing reasons, the Court DENIES Plaintiff's Motion.

2012 WL 273883
United States District Court,
N.D. California.

In re TFT–LCD (FLAT PANEL) ANTITRUST LITIGATION.
This Order Relates to: All Indirect–Purchaser Plaintiff Class Actions.

No. M 07–1827 SI. | MDL No. 1827. | Jan. 30, 2012.

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**Opinion**

## ORDER DENYING STATES OF ILLINOIS AND WASHINGTON'S MOTION TO MODIFY THE IPPS' CLASS FOR INJUNCTIVE RELIEF

SUSAN ILLSTON, District Judge.

***1** On January 20, 2012, the Court heard argument on the States of Illinois and Washington's (the "States") motion to modify the indirect-purchaser plaintiffs' (IPPs) class for injunctive relief. [1] Having considered the moving papers and the arguments of the parties, and for good cause appearing, the Court hereby DENIES the States' motion.

1 The State of South Carolina has requested leave to appear as *amicus curiae* on this motion. The Court GRANTS this request.

The States' motion is the latest exchange in a long-running territorial dispute in this MDL. Both the States and IPPs seek to represent, to differing degrees, the residents of Illinois and Washington. Those residents are currently members of the IPPs' injunctive relief class, a nationwide class certified under Rule 23(b)(2) [2] that asserts a single claim under the Sherman Act. They are also represented by the States in *parens patriae* actions currently pending in Illinois and Washington state courts. The States contend that their laws grant them, through their *parens patriae* powers, sole authority to represent their residents in collective actions. [3]

2 This rule provides that a class action may be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2).

3 *See* 740 Ill. Comp. Stat. § 10/7(2); Wash. Rev.Code § 19.86 .080.

Over time, this dispute has been winnowed down—IPPs, for example, no longer seek to represent Illinois or Washington purchasers in claims for monetary damages, while the States acquiesced to the recent IPP settlement after receiving numerous assurances concerning the scope of the settlement's release. The last remaining issue in this dispute is the ability of the indirect-purchaser plaintiffs to include Illinois and Washington residents in the nationwide injunctive class.

The States request that the nationwide class be modified to exclude residents of Illinois and Washington. They contend that a fundamental conflict of interest prevents IPPs from adequately representing their residents. Under this argument, IPPs are engaged in "claim splitting" by seeking only an injunction and not damages on behalf of Illinois and Washington residents. [4] According to the States, a judgment for or against the IPP injunctive relief class could have preclusive effects upon either the residents' future claims for damages or the States' own proprietary actions. *See* Motion at 5 ("[T]he IPPs are not pursuing monetary relief for the States' indirect purchasers, and—unless they are carved out from the class—their monetary claims could be precluded as res judicata.").

4 The States' brief also argues that IPPs may not release the state-law injunctive relief claims of their residents as part of the settlements reached in this matter. This matter was resolved to the States' satisfaction at the hearing on preliminary approval of the IPP settlements.

The Court concludes that the IPP injunctive-relief class will not preclude future claims by Illinois and Washington residents, and that modification of the class is therefore not warranted. In the Ninth Circuit, "the general rule is that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damages claims by class members, even if based on the same events." *Hiser v. Franklin,* 94 F.3d 1287, 1291 (9th Cir.1996). Indeed, "every federal court of appeals that has considered the question has held that a class action seeking only declaratory or

injunctive relief does not bar subsequent individual suits for damages." *Id.* (quoting *In re Jackson Lockdown/MCO Cases,* 568 F.Supp. 869, 892 (E.D.Mich.1983)).

***2** The rationale for this rule—which has typically been applied in the Title VII context—is that claims for monetary damages typically rely upon different facts than claims for injunctive relief. *See, e.g., Cooper v. Fed. Reserve Bank of Richmond,* 467 U.S. 867, 891, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984) ("The inquiry regarding an individual's claim is the reason for a particular employment decision, while 'at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.' "). The individualized factual showing needed to establish entitlement to money damages is generally not required for the blanket, one-size-fits-all remedies available to a(b)(2) class. *Cf. Wal–Mart v. Dukes,* — U.S. ——, ——, 131 S.Ct. 2541, 2557, 180 L.Ed.2d 374 (2011) ("The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' ").

The same basic dichotomy exists in this case. To prevail on their claim for injunctive relief, IPPs need only show "threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26; *see also Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc. .,* 140 F.3d 1228, 1235 (9th Cir.1998) ("[A]n antitrust plaintiff seeking injunctive relief need only show a threatened injury, not an actual one."). No further individualized showing is necessary to warrant injunctive relief for all class members. Plaintiffs seeking damages, in contrast, would have to make individualized showings on issues such as causation and damages to prevail.

The limited preclusive effect of a(b)(2) class is also evidenced by its limited procedural protections. Such classes are mandatory and do not require that class members be given notice or the ability to opt out. As numerous courts have noted, these limitations restrain the preclusive effect a(b)(2) class may have on its members:

> [Section] (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process.

*Dukes,* 131 S.Ct. at 2559. Some courts have found these limitations to be reason for refusing to certify a(b)(2) class where its members have potential claims for monetary recovery. *See Zachery v. Texaco Exploration and Production, Inc.,* 185 F.R.D. 230, 243–44 (W.D.Tex.1999) ("[T]he Court is not willing to gamble away the proposed class members' potential rights to compensatory damages in this case."). In the Court's view, however, it makes little sense to turn the mandatory nature of the (b)(2) class into a feature that counsels against certification. Instead, it is better seen as consistent with the prevailing view that (b)(2) classes are limited in the degree to which they may bind their members. *See Morrow v. Washington,* 277 F.R.D. 172, 203–04 (E.D.Tex.2011) (expressing disagreement with *Zachary* ); *Norris v. Slothouber,* 718 F.2d 1116, 1117 (D.C.Cir.1983) ("A suit for damages is not precluded by reason of the plaintiff's membership in a class for which no monetary relief is sought"); *Coleman v. General Motors Acceptance Corp.,* 220 F.R.D. 64, 81–82 (M.D.Tenn.2004) ("These authorities underscore the idea that it is far from clear that money damages would be precluded in separate individual damages actions."); *cf. Pate v. U.S.,* 328 F.Supp.2d 62, 73–74 (D.D.C.2004) (finding claims for monetary relief were not barred by res judicata where plaintiff had no notice of earlier (b)(2) class action).

***3** The States rely heavily on *Wal–Mart Stores, Inc. v. Dukes,* —U.S. ——, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), a recent Supreme Court decision that discussed whether a class certified under Rule 23(b)(2) could include claims for backpay or other individualized monetary relief. *Id.* at 2559. The plaintiffs argued that (b)(2) class certification was appropriate because the monetary relief "d[id] not 'predominate' over their requests for injunctive and declaratory relief." *Id.* at 2559. Noting that (b)(2) classes were "mandatory," however, and did not require notice to class members or the option to opt-out, the Supreme Court expressed concern with the plaintiffs' view:

> [Plaintiffs'] predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case,

> for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not "predominate." But it also created the possibility (if the predominance test were correct) that individual class members' compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was not the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial.

*Id.* Analogizing to this passage, the States contend that IPPs' nationwide injunctive relief class constitutes a similar threat to their residents' claims for monetary relief

The Court disagrees with the States' reading of *Dukes*. If the States' argument were correct, the (b)(2) class in *Dukes* would have had serious preclusive implications for its members regardless of whether or not the class sought monetary relief. Yet there seemed to be little controversy about the propriety of certifying a class limited to injunctive relief; instead, the Supreme Court focused on the problems that would arise if individualized relief were allowed in a(b)(2) class. This focus confirms what common sense suggests: a Rule 23(b)(2) judgment, with its one-size-fits-all approach and its limited procedural protections, will not preclude later claims for individualized relief. [5] Any other conclusion would eviscerate the (b)(2) class, preventing its use whenever there was a chance that unknown class members might have damages claims.

[5] As *Dukes* implies, a different issue arises when claim splitting occurs in the context of a class that seeks monetary damages. Because concerns about preclusion are much more significant in that circumstance, courts have refused to certify classes based on conflicts of interest between the named plaintiffs and the absent class members. Most of the cases the States rely on arose in this context. *See W. States Wholesale, Inc. v. Synthetic Indus.*, 206 F.R.D. 271, 277 (C.D.Cal.2002) (declining to certify (b)(3) class); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 283 (5th Cir.2008) (affirming denial of (b)(2) class certification where plaintiffs sought backpay but not compensatory or punitive damages); *Nafar v. Hollywood Tanning Sys., Inc.*, 339 Fed. Appx. 216 (3d Cir.2009) (vacating certification of (b)(3) class); *Krueger v. Wyeth, Inc.*, 2008 WL 481956 (S.D.Cal., Feb.19, 2008) (declining to certify (b)(3) class); *Drimmer v. WD–40 Co.*, 2007 WL 2456003 (S.D.Cal., Aug.24, 2007) (same); *but see Fosmire v. Progressive Max Ins. Co.*, 2011 WL 4801915 (W.D.Wash., Oct.11, 2011) (declining to certify (b)(2) class).

Thus, the Court is convinced that there is no conflict of interest here, and that the IPP injunctive relief class will not preclude claims for damages brought by or on behalf of the States of Illinois and Washington and their residents. Accordingly, the States' motion is DENIED.

## CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES the States' motion to modify the IPP injunctive relief class. Docket Nos. 4092, 4113.

***4 IT IS SO ORDERED.**

**Parallel Citations**

2012-1 Trade Cases P 77,783

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2008 WL 481956
Only the Westlaw citation is currently available.
United States District Court,
S.D. California.

April KRUEGER, Individually and on Behalf of All Others Similarly Situated, Plaintiff,
v.
WYETH, INC. f/k/a American Home Products, a Pennsylvania corporation; Wyeth Pharmaceuticals f/k/a Wyeth-Ayerst Pharmaceuticals, a Pennsylvania corporation; and Does 1 through 100, Inclusive, Defendant.

No. 03cv2496 JLS (AJB). | Feb. 19, 2008.

**Attorneys and Law Firms**

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Grace Lee, Shook Hardy & Bacon LLP, Irvine, CA, Fletcher C. Alford, Gordon & Rees LLP, San Francisco, CA, Frank Lane Heard, III, Wiliiams & Connolly LLP, Washington, DC, for Defendant.

**Opinion**

**ORDER: DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION WITHOUT PREJUDICE**

JANIS L. SAMMARTINO, District Judge.

***1** Presently before the Court are Plaintiff's motion to certify the class [Doc. No. 15], Defendant's Opposition [Doc. No. 29], and Plaintiff's Reply [Doc. No. 33.] For the following reasons, the Court **DENIES** Plaintiff's motion **without prejudice.**

**BACKGROUND**

In December 2003, Plaintiff April Krueger filed a products liability action against Wyeth and Wyeth Pharmaceuticals Inc. in the U.S. District Court for the Southern District of California. [Defs.' Motion at 4.] The case was transferred to the Eastern District of Arkansas (Judge William R. Wilson, Jr.) for pre-trial proceedings pursuant to 28 U.S.C. § 1407 as part of *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555 (E.D.Ark.2005) (MDL-1507).[1] After transfer, the allegations of Ms. Krueger's complaint were merged with those of other class action complaints into a Master Class Action Complaint, which was filed January 7, 2004. The Master Class Action Complaint sought to certify a multi-state class action on behalf of women seeking consumer protection relief and medical monitoring. The putative class included women who purchased Wyeth's Hormone Replacement Therapy drugs ("HRT") to alleviate postmenopausal symptoms. Judge Wilson denied class certification, in part, because of the differences in state law governing the plaintiffs' causes of action. Plaintiff Krueger's case was then remanded back to this Court. [*Id.*]

1 This Court incorporates by reference the background facts as set forth in Judge Wilson's opinion.

Plaintiff now requests that this Court certify a Rule 23(b)(3) damages class that is defined as:

> All California consumers who purchased Wyeth's Hormone Replacement Therapy products, *Premarin, Prempro, and/or Premphase,* between January 1995 and January 2003.

[Pl.'s Motion at 4.] Plaintiff seeks two forms of relief for the class members:

> First, Plaintiff seeks a refund of all purchase monies Class Members spent and disgorgement of profits Wyeth earned from HRT sales to Class Members as provided for by California's Unfair Competition Law (UCL), Business and Professions Code §§ 17200 et. seq.
>
> Plaintiff Krueger also seeks damages, statutory damages, punitive damages and/or refunds of purchase monies Class Members spent for these products as provided for by California's Consumer Legal Remedies Act (CLRA), Civil Code §§ 1750 et. seq.

[*Id.*] Defendants note that unlike Plaintiff's prior class definition, her current definition fails to exclude women seeking personal injury damages.

**LEGAL STANDARD**

Motions for class certification proceed under Rule 23(a) of the Federal Rules of Civil Procedure. Rule 23(a) provides four prerequisites to a class action: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a).

A proposed class must also satisfy one of the subdivisions of Rule 23(b). To certify a class under Rule 23(b)(3), plaintiffs must demonstrate that: "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

***2** As the party seeking to certify a class, plaintiffs bear the burden of demonstrating that they satisfy each of the Rule 23 requirements. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir.2001); *W. States Wholesale, Inc. v. Synthetic Indus., Inc.*, 206 F.R.D. 271, 274 (C.D.Cal.2002). "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (*quoting Miller v. Mackey Int'l.*, 452 F.2d 424 (5th Cir.1971) (internal quotation marks omitted). However, the Court is "at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir.1992).

## ANALYSIS

### I. The Class Cannot be Certified Because Ms. Krueger Cannot Adequately Protect the Interests of the Class as it is Defined

Rule 23(a)(4) provides that class representatives must "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). The adequacy requirement is met if the class representatives meet two conditions: (1) the named representatives must appear able to prosecute the action vigorously through qualified counsel, and (2) the representatives must not have antagonistic or conflicting interests with the unnamed members of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.1978). The Supreme Court has indicated that:

> The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members.

*Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (internal citations and quotations omitted).

Here, the proposed California class consists of "[a]ll California consumers who purchased Wyeth's Hormone Replacement Products ...;" thus, it would include *both* uninjured plaintiffs, like Ms. Krueger, as well as injured plaintiffs. [Pl.'s Motion at 4.] Plaintiff states in her motion that she seeks damages, punitive damages, and statutory damages, but in her reply indicates that she only seeks statutory damages (i.e. a refund of the purchase price). If Plaintiff is only seeking partial relief, and will not pursue damages for those that have manifest personal injuries, then she is engaging in claim-splitting.

"Claim splitting is generally prohibited by the doctrine of res judicata, which bars parties to a prior action[,] or those in privity with them[,] from raising in a subsequent proceeding any claim they could have raised in the prior action where all of the claims arise from the same set of operative facts." *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 668 (D.Kan.2004); *see generally* Restatement (Second) of Judgments 2d § 24 (1982) (stating the general rule barring splitting claims). As a California court explained:

> ***3** It is clear under California law a party cannot, as a general rule, split a single cause of action because the first judgment bars recovery in a second suit on the same cause. As a result, by seeking damages only for diminution in market value, plaintiffs would effectually be waiving, on behalf of the hundreds of class members, any possible recovery of potentially substantial damages-present or future. This they may not do.

*City of San Jose v. Superior Court,* 12 Cal.3d 447, 464, 115 Cal.Rptr. 797, 525 P.2d 701 (1974) (internal citations omitted).

Other courts agree that the existence of claim splitting constitutes a compelling reason to deny class certification. For example, in *Feinstein v. Firestone Tire & Rubber Co.,* 535 F.Supp. 595, 606 (S.D.N.Y.1982), the court refused to certify a class where the class representatives asserted claims of breach of implied warranty of merchantability, but not for death, injury, or accident-related property damage due to allegedly defective tires. The *Feinstein* court's rationale applies here:

> [A] serious question of adequacy of representation arises when the class representatives profess themselves willing, as they do here, to assert on behalf of the class only such claims as arise from the breach of an implied warranty ... Plaintiffs so tailored the class claims in an effort to improve the possibility of demonstrating commonality. But that improvement-essentially cosmetic ... was purchased at the price of presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action.

*Id.*

In an analogous case, *Pearl v. Allied Corp.,* 102 F.R.D. 921, 922-23 (E.D.Pa.1984), the court determined that the proposed named plaintiffs were inadequate class representatives because they sought to recover the cost of removing an allegedly defective product, punitive damages, and a fund for testing, screening and treatment of future medical problems, while they abandoned their claims for present physical injury, dimunition in property value, and breach of express warranty.

In another related case, a court refused to certify a medical monitoring class of smokers because the class representatives failed to assert claims for personal injury on behalf of absent class members. *Thompson v. American Tobacco Co.,* 189 F.R.D. 544, 550-51 (D.Minn.1999). The court reasoned that "the possible prejudice to class members is simply too great for the Court to conclude that the named Plaintiffs' interests are aligned with those of the class." *Id.* at 551.

Finally, a recent court from this District, confronted with a similar issue, cited *Thompson* and found the class representative inadequate, in part, because he could not "simultaneously represent injured and uninjured class members" and "abandon[ ] particular remedies to the detriment of the class." *Drimmer v. WD-40 Co.,* 2007 U.S. Dist. LEXIS 62582, *5-9 (S.D.Cal.2007). The court also noted that "[a]ssuming for the sake of argument that res judicata would not bar the class members from obtaining further relief [citation], the court cannot ignore the inference that [the class representative] holds different priorities and litigation incentives than a typical class member." *Id.* at *8.

***4** In the present action, Plaintiff leaves the class open to those who have suffered personal injuries, while stating she does not seek to pursue personal injury damages claims. As a result, the Court finds that Plaintiff Krueger is an inadequate class representative under the current class definition.

## CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiff's motion to certify the class without prejudice. [2] [3]

2 The Court also **DENIES** Defendant's request for judicial notice of supplemental authority as moot.

3 The Court recognizes that Plaintiff may be able to satisfy the adequacy requirement by redefining the class and therefore **DENIES** the motion to certify **without prejudice.** However, the Court also recognizes that Plaintiff's claims are dependent on the resolution of legal questions that are currently pending before the California Supreme Court. Several courts are waiting on the California Supreme Court to resolve these "reliance" questions before rendering judgment on similar claims. For example, a court in the Northern District of California recently stated:

> It is therefore unsettled, as a matter of California law, whether actual reliance is required to plead a cause of action under [the] UCL or FAL. As the state's highest court is in the process of deciding this question, it would be imprudent for the court to reach the issue at this time. Accordingly, the court reserves judgment on plaintiffs' UCL and FAL

> claims until after the California Supreme Court issues its decisions on these cases.

*Faigman v. AT & T Mobility LLC,* 2007 U.S. Dist. LEXIS 52192, *20-22 (N.D.Cal.2007); *see also Suzuki v. Hitachi Global Storage Techs., Inc.,* 2007 U.S. Dist. LEXIS 51605, *19-21 (N.D.Cal.2007) ("As the state's highest court is in the process of deciding this [reliance] question, it would be imprudent for the court to reach the issue at this time."). Accordingly, this Court finds that it cannot properly resolve Plaintiff's claims until the California Supreme Court rules on these "reliance" issues.

**End of Document**

2009 WL 1514435
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

Elizabeth SANCHEZ, for herself and on behalf of those similarly situated, Plaintiffs,
v.
WAL MART STORES, INC., Dorel Juvenile Group, Inc.; and Does 1 through 25, inclusive, Defendants.

No. Civ. 2:06–CV–02573–JAM–KJM. | May 28, 2009.

**Attorneys and Law Firms**

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**Opinion**

***ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION***

JOHN A. MENDEZ, District Judge.

***1** This matter is before the Court on Plaintiff Elizabeth Sanchez's ("Plaintiff") motion for class certification pursuant to Federal Rule of Civil Procedure 23. Defendants Wal–Mart Stores, Inc. ("Wal–Mart") and Dorel Juvenile Group, Inc. ("DJG") (collectively "Defendants") oppose the motion. The parties appeared before the Court for a hearing on this motion on May 13, 2009. For the reasons set forth below, Plaintiff's motion is DENIED.

## I.FACTUAL AND PROCEDURAL BACKGROUND

In June 2005, Sanchez alleges she bought a Dorel model 01–834 PGH stroller ("Stroller") from Wal–Mart at Florin Road in Sacramento, California. Sanchez contends that she relied on Defendants' representations that the Stroller was safe, easy to use, of merchantable quality, and fit for its intended and reasonably foreseeable uses. Sanchez further contends that Defendants failed to adequately warn about a "dangerous, unguarded and unmitigated pinch point" that creates an "unreasonable potential for harm." Sanchez claims that were it not for Defendants' false and misleading statements, in the form of written representations and material omissions, she would not have purchased the $20 Stroller. According to Sanchez, once she learned of the Stroller's potential for harm, she had to replace it, and therefore suffered harm.

On October 2, 2006, Sanchez filed a class action lawsuit against Defendants in state court. On November 16, 2006, Defendants removed the case to this Court on the basis of diversity. Doc. # 1. On January 18, 2008, Sanchez filed a second amended complaint seeking equitable relief, including restitution and injunctive relief in the form of a recall. Doc. # 84. In the instant motion, Plaintiff seeks to certify this action as a class action. Doc. # 124. Defendants oppose the motion. [1] Doc. # 156.

1 Also before the Court is Defendants' Motion to Strike Plaintiff's Experts' Declarations. Doc. # 153. Defendants' Motion to Strike is GRANTED only to those portions of the William F. Kitzes Declaration that contain legal conclusions and/or opinions on an ultimate issue of law. *See e.g.*, Doc. # 37–7 ¶¶ 12, 15. For all other portions of the experts' declarations, Defendants' Motion to Strike is DENIED. Moreover, the experts' declarations themselves are not the reason this Court is denying class certification.

## II. OPINION

### A. *Legal Standard*

A party seeking to certify a class must satisfy the four prerequisites enumerated in Rule 23(a), as well as at least one of the four requirements of Rule 23(b). Under Rule 23(a), the party seeking class certification must establish that: (1) the class is so large that joinder of all members is impracticable (i.e.numerosity); (2) there are one or more questions of law or fact common to the class (i.e., commonality); (3) the named parties' claims are typical of the class (i.e., typicality); and (4) the class representatives will fairly and adequately protect the interests of the other members of the class (i.e. adequacy of representation). Fed.R.Civ.P. 23(a). In addition to satisfying these prerequisites, parties seeking class certification must show that the action is maintainable under Rule 12(b)(1),

(2), or (3). *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); see also Fed.R.Civ.P. 23(b). Class actions for monetary damages are permissible where "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3). Satisfaction of Rule 23(b)(3) also requires that litigation of a class action be more efficient and fairer than alternative methods of adjudication. *Id.*

***2** The party seeking certification must provide facts sufficient to satisfy Rule 23(a) and (b) requirements. *Doninger v. Pacific Northwest Bell, Inc.,* 564 F.2d 1304, 1308–09 (9th Cir.1977). In turn, the district court must conduct a rigorous analysis to determine that the prerequisites of Rule 23 have been met. *Gen. Tel. Co. v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). If a court is not fully satisfied, certification should be refused. *Id.*

**B. *Rule 23 Analysis***

Plaintiff has not met her burden in establishing that the requirements of Rule 23 have been met. First, certification of a Rule 23(b)(3) class requires a finding not only that common issues exist, but that they "predominate" over individual issues. Fed.R.Civ.P. 23(a)(2), (b)(3). Here, the common issues relied on by Plaintiff in support of her motion do not predominate over the individual issues identified by Defendants in their opposition to this motion. The record established that there are many individual factors that must be examined before determining whether a particular individual's behavior with respect to the Stroller would have been materially changed by the presence of safety warnings. *See, e.g., Thorogood v. Sears, Roebuck & Co.,* 547 F.3d 742, 746–747 (7th Cir.Ill.2008); *Blackwell v. Skywest Airlines, Inc.,* 245 F.R.D. 453 (S.D.Cal.2007) (refusing to certify class because of the need for "extensive individualized inquiries"). Class members are likely to react differently to the disclosure of safety information, therefore there are no "common" issues, and certainly no common issues that predominate. *See id.*

Second, there is no proof of the existence of injury on a classwide basis. When fact of injury cannot be established through classwide proof, class certification is improper. *See, e.g., Caro v. Procter & Gamble,* 18 Cal.App.4th 644, 668, 22 Cal.Rptr.2d 419 (1993) (the Court concluded that "whether any asserted misrepresentation induced the purchase of [ ] orange juice would vary from consumer to consumer," and therefore, the issue of liability was not susceptible to classwide proof). Here, Plaintiff contends that she and the absent class members sustained a classwide injury because (1) they were required to replace their allegedly defective Strollers or (2) they purchased a "less valuable" or "devalued" Stroller and failed to receive the "benefit of the bargain," represented by "the extent to which the product was devalued by the breach." Neither of these purported injuries however, can be established through classwide proof.

There is simply no way to determine whether any particular class member "replaced" the Stroller that he or she purchased with a different one, absent an individualized inquiry into that class member's particular circumstance. Further, whether any particular Stroller was "devalued" by the alleged breach is likewise an inherently individualized issue. For example, in Plaintiff's case, she made full use of the perfectly functioning Stroller for 18 months. Plaintiff must prove that she did not receive her $20 worth from the Stroller. It is impossible for her to prove that each and every one of the hundreds of thousands of potential class members did not receive the Stroller's worth either. Thus, because individual issues permeate every aspect of the claims in this suit, the requirement to prove commonality under Rule 23 has not been met.

***3** Plaintiff's motion for class certification is also denied because she is an inadequate class representative. Her claims are not typical of the putative class and she cannot satisfy the "adequacy of representation" requirements of Rule 23(a)(3) and (a)(4). The requirements that a class representative's claims be "typical" of those of the putative class, and that the class representative and class counsel "fairly and adequately" represent the interests of that class, ensure that the class representative is part of the proposed class, possesses the same interest, and suffers the same injury as the absent class members. *See e.g. Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 626, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Here, Plaintiff's claims do not satisfy either the typicality or the adequacy requirements for many of the same reasons that her claims do not satisfy the commonality and predominance requirements. First, Plaintiff's claims are not typical of those of the class she seeks to represent. There are innumerable variations in the experiences and information possessed by consumers, in the factors that influence consumers' purchasing decisions, and in the manner by which consumers react to product warnings and the disclosure of safety information. The putative class will include persons who knew about the alleged hazard, yet purchased the product

anyway; people, like Plaintiff, who bought the Stroller because of its price, size, and other characteristics; and many others for whom the "warning" would have made no difference in their purchase decision. As a result, there is no "typical" claim or experience, certainly not Plaintiff's experience, that can be extrapolated classwide. *See e.g. Oshana v. Coca–Cola Bottling Co.,* 472 F.2d 506 (7th Cir.2006). As such, the typicality requirement has not been satisfied.

Further, Plaintiff has not demonstrated that she will fairly and adequately protect the interests of the other members of the class as required by Rule 23. Fed.R.Civ.P. 23(a)(4). As part of this inquiry, the Court must ensure that the litigation is brought by a named Plaintiff who understands and controls the major decisions of the case. Class counsel may not act "on behalf of an essentially unknowledgeable client," for to proceed with that plaintiff as class representative "would risk a denial of due process to the absent class members." *Burkhalter Travel Agency v. MacFarms Int'l, Inc.,* 141 F.R.D. 144, 154 (N.D.Cal.1991). The record here demonstrates that Plaintiff's counsel, and not Plaintiff, is the driving force behind this action. *See e.g., Bodner v. Oreck Direct, LLC,* 2007 WL 1223777, at 2–3* (N.D.Cal. Apr.25, 2007). Despite Plaintiff's professed concerns over the alleged danger presented by the Stroller, and her fiduciary duties to "fairly and adequately" represent putative class members, her counsel has chosen not to pursue any personal injury claims on behalf of those class members, but rather to limit their claims to "economic injury ." This strategic claim-splitting decision creates a conflict between Plaintiff's interests and those of the putative class, and renders Plaintiff an inadequate class representative. Plaintiff learned that she allegedly had a claim against Defendants only after her uncle was injured and class counsel contacted her and told her so. Such a "cart before the horse" approach to litigation is not the proper mechanism for the vindication of legal rights. *See id., citing Meachum v. Outdoor World Corp.,* 171 Misc.2d 354, 654 N.Y.S.2d 240, 369 (1996) ("Solicitation of clients for the commencement or continuation of a class action is improper, sufficient to warrant denial of class action certification"). The Court is concerned that adjudication of Plaintiff's individual claims necessarily will devolve into disputes over her unique circumstances, to the detriment of the claims of absent class members. As such, the Court finds that Plaintiff has not demonstrated that she will fairly and adequately protect the interests of the other members of the class as required by Rule 23.

***4** Finally, Rule 23 also requires Plaintiff to prove that a class action is the "superior" method for adjudicating this controversy. Fed.R.Civ.P. 23(b)(3). Among the factors a Court must consider in making this superiority finding are "the likely difficulties in managing a class action." Fed.R.Civ.P. 23(b)(3)(D). Here, individual issues permeate every aspect of the claims in this suit—from proving membership in the putative class, to establishing liability and the fact of injury, to ascertaining the amount of damages. Where, as here, individual issues predominate, the superiority requirement is not satisfied. "If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.' " *Zinser v. Accufix Res. Inst., Inc.,* 253 F.3d 1180, 1192 (9th Cir.), *as amended,* 273 F.3d 1266 (9th Cir.2001). Because the only persons likely to benefit from a class action in this case are class counsel, a costly and time-consuming class action is "hardly the superior method for resolving the dispute." *In re Hotel Tel. Charges,* 500 F.2d 86, 91 (9th Cir.1974). Accordingly, the Court finds that Plaintiff has not satisfied the prerequisites enumerated in Rule 23.

***C. Due Process Analysis***

Beyond the Rule 23 requirements, certification of a class here would violate Defendants' constitutional rights to due process. "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet,* 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972). This constitutionally mandated opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). Indeed, class actions may "achieve economies of time, effort, and expense," but only when those goals can be achieved "without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Here, Defendants would be denied their right to due process if a class action were permitted to proceed. Defendants must be afforded the opportunity to explore and introduce evidence, with respect to each class member's claim, including (1) whether (and where) the class member actually purchased the Stroller; (2) the types of alleged representations or warnings the class member heard or read; (3) the knowledge the class member already possessed about the supposed hazard presented by the hinge; (4) the factors relevant (or not relevant) to that class member's decision to purchase the Stroller; (5) whether the proposed warning would have

materially affected the class member's purchase decision; (6) the price the class member paid for the Stroller, (7) the class member's use of and experience with that Stroller; (8) whether the class member replaced the Stroller; and (9) the supposed true "value" of the Stroller, among many other factors. Given the numerous individualized inquires required to adjudicate the claims brought on behalf of the putative class, any attempt to try these claims on a classwide basis would deprive Defendants of their due process right to a fair trial, including the right to present "every available defense" to those claims. Accordingly, class certification in this action would deny Defendants of their right to due process.

## III. ORDER

***5** For the reasons set forth above, Plaintiff's Motion to Certify the Action as a Class Action is DENIED.

IT IS SO ORDERED.

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